

Bingham v. State

Court of Appeals of Mississippi November 24, 1998, Decided NO. 97-KA-00538 COA

Reporter

723 So. 2d 1189 *; 1998 Miss. App. LEXIS 977 **

DERRICK BINGHAM, APPELLANT v. STATE OF MISSISSIPPI, APPELLEE

Prior History: [**1] DATE OF JUDGMENT: 03/25/97. TRIAL JUDGE: HON. JAMES E. GRAVES JR. COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT. TRIAL COURT DISPOSITION: AGGRAVATED ASSAULT WWEAPON: SENTENCED TO SERVE A TERM OF 20 YRS IN THE CUSTODY OF THE MDOC; 5 YRS SUSPENDED & 15 YRS TO SERVE.

Disposition: AFFIRMED.

Core Terms

hearsay, admissible, shot, trial court, shooting, night

Case Summary

Procedural Posture

Defendant sought review of a judgment from the Hinds County Circuit Court (Mississippi), which convicted him on a charge of aggravated assault with a weapon brought by plaintiff State.

Overview

Defendant allegedly brandished a pistol at the victims while they were in their car and he demanded the return of money he was told that they stole from him. A car chase ensued, with defendant allegedly shooting one of the victims in the neck and having aimed at the other victim, as that victim testified he saw the red light from the gun flashing across the dashboard. Defendant was charged and convicted of aggravated assault with a weapon. The court rejected defendant's contention that it was error not to permit him to question the individual who informed him about the alleged break-in and theft of money from defendant's car by the victims because

whether that actually happened was an irrelevant collateral inquiry that was not probative of whether defendant was guilty or not. Defendant also objected to the trial court's admission of the sheriff's deputy's statement regarding an out-of-court statement gave to him by one of the victims that was contained in the police report even though the full report was not admitted. The court held that defendant was unable to introduce the report for the purpose of using hearsay statements contained within to contradict testimony given at trial.

Outcome

The court affirmed the judgment of the trial court that convicted defendant of one count of aggravated assault with a weapon.

LexisNexis® Headnotes

<u>Evidence</u> > ... > Testimony > Credibility of Witnesses > General Overview

HN1[Testimony, Credibility of Witnesses

The use collateral matters are not proper means of impeachment.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

<u>Evidence</u> > Relevance > Preservation of Relevant <u>Evidence</u> > Exclusion & Preservation by Prosecutors

Evidence > Relevance > Relevant Evidence

HN2[] Standards of Review, Abuse of Discretion

Error > Juries & Jurors

The relevancy and admissibility of <u>evidence</u> are within the trial court's discretion and reversal may be had only where that discretion has been abused. <u>M.R.E. 103(a)</u>, 401.

<u>Evidence</u> > ... > Exceptions > Business Records > Admissibility in Criminal Trials

<u>Evidence</u> > ... > Exceptions > Business Records > General Overview

<u>HN3</u>[♣] Business Records, Admissibility i Criminal Trials

Statements and information contained within the <u>report</u> that are factual in nature would be <u>admissible</u> and qualify as information routinely obtained in the regular course of business under *M.R.E.* 803(6).

<u>Evidence</u> > ... > Exceptions > Business Records > Admissibility in Criminal Trials

<u>Evidence</u> > ... > Exceptions > Business Records > General Overview

<u>Evidence</u> > ... > Hearsay > Rule Components > Statements

<u>HN4[</u>.] Business Records, Admissibility in Criminal Trials

The very nature of <u>police</u> investigation <u>reports</u> also requires the taking of statements from parties, witnesses, and bystanders, statements which lack the safeguards outlined within the definition of hearsay and non-hearsay under <u>M.R.E. 801</u>.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

<u>Evidence</u> > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Appeals > Reversible

HN5 Appeals, Standards of Review

When the weight of the <u>evidence</u> is challenged the court will not retry the facts but must take the view of the <u>evidence</u> most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory <u>evidence</u>. On review, the court accepts as true all <u>evidence</u> favorable to the State, and the State is given the benefit of all favorable inferences that may reasonably be drawn from the <u>evidence</u>. The court will reverse such a ruling only where reasonable and fair-minded jurors could only find the accused not guilty.

Counsel: ATTORNEYS FOR APPELLANT: LEE B. AGNEW, JR., KATE S. EIDT.

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: JEAN SMITH VAUGHAN, DISTRICT ATTORNEY: EDWARD J. PETERS.

Judges: THOMAS, P.J. BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

Opinion by: THOMAS

Opinion

[*1190] NATURE OF THE CASE: CRIMINAL - FELONY

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

P1. Derrick Bingham appeals his conviction of aggravated assault raising the following issues as error:

I. WHETHER THE COURT ERRED IN PROHIBITING TESTIMONY OF A DEFENSE WITNESS DIRECTLY CONTRADICTING THE TESTIMONY OF THE STATE'S WITNESS CALLING INTO QUESTION THE CREDIBILITY AND VERACITY OF THE STATE'S WITNESS.

II. WHETHER THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY FROM A SHERIFF'S DEPUTY REGARDING CERTAIN OUT OF COURT STATEMENTS THAT THE STATE'S WITNESS [**2]

SAID TO HIM YET DENYING THE ENTRY OF THIS OFFICER'S <u>REPORT</u> INTO <u>EVIDENCE</u> AS A BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE PURSUANT TO <u>MISSISSIPPI RULES OF EVIDENCE</u>, <u>RULE 803 (6)</u>.

III. WHETHER THE JURY VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE **EVIDENCE**.

P2. Finding no reversible error, we affirm.

FACTS

P3. During the mid-day hours on January 26, 1996, a shooting occurred at the intersection of Moncure-Marble Road and Daniels Drive in Terry, Mississippi. At around eleven o'clock in the morning Timothy Wilson and his brother Leonard Wilson were driving in Leonard's '79 Caprice Classic. Timothy was the driver, and Leonard was the passenger. As they approached the intersection of Moncure-Marble Road and Daniels Drive, they spotted Derrick Bingham standing at the end of Daniels Drive with a pistol. The Wilsons testified that Bingham stopped their vehicle, brandished a .357 pistol with an infra-red light, and demanded the return of some money stolen from Bingham's car the previous night. Bingham testified he was acting based on information provided by Willie Alford. Bingham testified that Alford told him that Timothy and Leonard Wilson were the ones who [**3] had broken into and stolen \$5,000 cash from Bingham's vehicle. At trial the Wilsons denied breaking into Bingham's vehicle and taking any money.

P4. At trial Timothy testified that after Bingham stopped their vehicle, Bingham demanded that they "come up with his money", to which Timothy responded, "What money?" and that Bingham then shot the driver's side front tire. Timothy Wilson drove away while Bingham was reloading his pistol and proceeded to his grandmother's house on Moncure-Marble Road. While the Wilsons were making their escape Bingham's companion, Tim Green, also began to fire upon the Wilsons's vehicle. The Wilsons testified that Green's bullets struck a second tire and the rear windshield of their vehicle.

P5. Bingham and Green got into a Z-24, and began to pursue the fleeing Wilsons down Moncure-Marble Road. Green was the driver of the Z-24 and Bingham was the passenger. As Green and Bingham quickly closed in on the Wilsons's vehicle, Bingham leaned out of the passenger window and began firing upon the Wilsons again. As the Wilsons approached to within fifty to a

hundred yards of their grandmother's house, Timothy Wilson was shot twice by Bingham. Timothy Wilson [**4] was struck once in the ear and once in the neck. Leonard Wilson testified that during the chase, he kept his head down but could see a red laser light flashing across the dashboard during the shooting and that the bullets were concentrated in the driver's area. After Timothy Wilson was shot by Bingham, he eventually lost control of the vehicle after entering his grandmother's driveway. Bingham and Green broke off their chase at this point and fled the scene.

P6. At trial both Bingham and Green testified to their version of the incident. Bingham [*1191] testified that he approached Timothy and Leonard Wilson unarmed to inquire as to whether they had broken into his car the previous night and stolen some money. Bingham testified that during his inquiry with the Wilson brothers, Timothy Wilson produced a gun and began firing at him. Bingham testified that he ran to his car to retrieve a gun in self-defense and returned fire as Timothy Wilson continued to fire while speeding away. Bingham further testified that neither he nor Green pursued the Wilsons. Green corroborated Bingham's version and further testified he did not have a weapon nor did he fire upon the Wilsons.

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COURT **ERRED** IN WHETHER [**5] THE **PROHIBITING TESTIMONY** OF Α DEFENSE CONTRADICTING WITNESS DIRECTLY TESTIMONY OF THE STATE'S WITNESS CALLING INTO QUESTION THE CREDIBILITY AND VERACITY OF THE STATE'S WITNESS.

P7. Bingham contends the trial court erred in not permitting him to effectively question Willie Arthur regarding an alleged break-in and theft of money from Bingham's car by the Wilson brothers the night prior to the shooting. Bingham maintains that Arthur's testimony was necessary to attack the truth and veracity of Timothy and Leonard Wilson's testimony. Had Arthur's testimony been allowed, he would have testified that he and the Wilson brothers were the ones who had broken into and stole money from Bingham's vehicle the night prior to the shooting. Bingham maintains Arthur's testimony was necessary to attack Timothy Wilson's testimony, in which he denied any such break-in or theft on his part. We note at the outset that Bingham himself testified that Arthur told him that both he and the Wilson brothers were the ones who broke into Bingham's vehicle and stole the money.

P8. In support of his argument Bingham cites to <u>M.R.E.</u>. 608 (b) and <u>Miskelley v. State</u>, 480 So. 2d 1104 (Miss. $I^{**}6I$ 1985). Bingham argues that under Miskelley any evidence which is material and relevant and effects the credibility of a witness is <u>admissible</u>. Id. He further argues that where there is doubt as to the relevancy of the examination the court should always weigh in favor of admitting the testimony. Id. We are not persuaded that the testimony offered by Arthur meets the criteria discussed in Miskelley or is acceptable under <u>M.R.E.</u> 608 (b).

P9. Whether Timothy Wilson in fact did break into and steal money from Bingham's vehicle the night prior to the shooting is an irrelevant collateral inquiry, not a substantive, probative fact relevant to the real issue involved, which was the guilt or innocence of Bingham. The inquiry is irrelevant to the issue of whether Bingham committed an aggravated assault against Timothy Wilson and would tend neither to prove nor disprove any material issue at hand and would not be a proper subject for contradiction. M.R.E. 401, 608 (b). In addition, we remain mindful of the principle that HN1[*] the use collateral matters are not proper means of impeachment. Miskelley, 480 So. 2d at 1108. Finally, it is well settled that HN2[*] the relevancy and admissibility [**7] of evidence are within the trial court's discretion and reversal may be had only where that discretion has been abused. Stromas v. State, 618 So. 2d 116, 119 (Miss. 1993); M.R.E. 103(a), 401. We find no error in denying the testimony of Arthur that Timothy Wilson participated in the break-in and theft of money from Bingham's vehicle. This argument is without merit.

И.

WHETHER THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY FROM A SHERIFF'S DEPUTY REGARDING CERTAIN OUT OF COURT STATEMENTS THAT THE STATE'S WITNESS SAID TO HIM YET DENYING THE ENTRY OF THIS OFFICER'S <u>REPORT</u> INTO <u>EVIDENCE</u> AS A BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE PURSUANT TO <u>MISSISSIPPI</u> RULES OF EVIDENCE, RULE 803 (6).

P10. Bingham assigns as error rulings by the trial court admitting testimony concerning a statement contained within a <u>police</u> [*1192] <u>report</u>, yet denying the admission of the full <u>report</u>. During the direct examination of Hinds County Deputy Kevin May, May was asked what name Timothy Wilson gave as the person who had shot him. Bingham objected to this

testimony as hearsay and was overruled by the trial court.

P11. May was unable to recall the exact name provided by Timothy Wilson and [**8] was allowed to refer to his investigation <u>report</u> to refresh his recollection. Despite the fact that May's <u>report</u> was used for the sole purpose of refreshing his recollection regarding the name of the person whom Timothy Wilson provided as the person who had shot him, that testimony was hearsay and inadmissible. However, we note that both Timothy and Leonard Wilson testified that it was Bingham who shot Timothy. Therefore, the admission of the statement made by Timothy to Deputy May concerning who had shot him was harmless error.

P12. For the same reason Bingham objected to the admission of Timothy's statement to Deputy May concerning the identity of his aggressor, the contents of other statements contained within the investigation report are likewise inadmissible as hearsay. At the close of Bingham's case-in-chief, Bingham argued to the trial court to have May's report in full entered into evidence for the jury's consideration. After lengthy argument by Bingham for the report's admissibility under Rule 803 (6), the trial court denied the report's admission.

P13. As previously discussed we will not reverse the lower court's ruling on the relevancy and admissibility of <u>evidence</u> [**9] absent an abuse of discretion. Stromas, 618 So. 2d at 119. Bingham contends that the investigation <u>report</u> prepared by Deputy May falls under <u>Rule 803 (6)</u> as an exception to the hearsay rule and is therefore <u>admissible</u>. Bingham relies on <u>Copeland v. City of Jackson, 548 So. 2d 970 (Miss. 1989)</u> in support of his contention. We are not persuaded by this argument.

P14. Bingham is correct in relying on Copeland as authority for determining the admissibility of police reports into evidence. However, Bingham's cite to the Copeland language as submitted in his brief to this Court is in need of further reading. The Copeland court went on to state that:

In holding such <u>report admissible</u> we should not be understood as holding all the contents of the <u>report</u> were necessarily <u>admissible</u>. For example, there may be notations in such a <u>report</u> which are recitations of statements of others, and would be inadmissible even though the officer were present in court testifying. The <u>report</u> is simply a substitute for the officer appearing in person and testifying.

Copeland, 548 So. 2d at 975-976. HN3[*] Statements and information contained within the report that are factual in [**10] nature would be admissible and qualify as information routinely obtained in the regular course of business under Rule 803 (6). However, HN4[**] the very nature of police investigation reports also requires the taking of statements from parties, witnesses, and bystanders, statements which lack the safeguards outlined within the definition of hearsay and non-hearsay under Rule 801.

P15. It is readily apparent from the record that Bingham sought to introduce Deputy May's <u>report</u> for the sole purpose of using hearsay statements contained therein to contradict testimony provided at trial. The admission of the <u>report</u> for this purpose is clearly improper under our rules on hearsay <u>evidence</u> and was therefore properly excluded by the trial court. There is no merit in this assignment of error.

III.

WHETHER THE JURY VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE **EVIDENCE**.

P16. Bingham challenges the jury verdict as contrary to the overwhelming weight of the evidence. Bingham argues that the evidence presented at trial was insufficient to support a guilty verdict and as such should be reversed. This case involved a classic jury question. HN5 When the weight of the evidence is challenged [**11] we will not retry the facts but must take the view of the evidence most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory evidence. McClain v. State, 625 [*1193] So. 2d 774, 778 (Miss. 1993); Griffin v. State, 607 So. 2d 1197. 1201 (Miss. 1992). On review, we accept as true all evidence favorable to the State, and the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." Griffin, 607 So. 2d at 1201 (citations omitted). We will reverse such a ruling only where "reasonable and fair-minded jurors could only find the accused not guilty." McClain, 625 So. 2d at 778 (citing Wetz v. State, 503 So. 2d 803, 808 (Miss. 1987); Harveston v. State, 493 So. 2d 365, 370 (Miss. 1986)).

P17. We have considered all of Bingham's arguments and citations, commented here as needed, and find further discussion unnecessary. This assignment of error is without merit.

P18. THE JUDGMENT OF THE CIRCUIT COURT OF

HINDS COUNTY OF CONVICTION OF AGGRAVATED ASSAULT WITH WEAPON AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS [**12] WITH FIVE YEARS SUSPENDED AND FIFTEEN YEARS TO SERVE IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

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Holt v. State

Supreme Court of Mississippi July 27, 1977 No. 49602

Reporter

348 So. 2d 434 *; 1977 Miss. LEXIS 2093 **

Darrell Dean HOLT v. STATE of Mississippi

Disposition: [**1] REVERSED AND REMANDED.

Core Terms

search warrant, Street, confession, robbers, circumstances, informant, underlying fact, establishment, witnesses, robbery, eyewitness, documents, maroon, male, voluntariness, reliability, probable, suppress, jacket, door

Case Summary

Procedural Posture

Defendant appealed from a judgment of conviction in the Circuit Court of Washington County (Mississippi) of the crime of armed robbery and a sentence of 15 years.

Overview

Defendant was convicted of robbing a restaurant. The court reversed. The search of defendant's residence was lawful. However, the admission into evidence of the affidavit for the search warrant including the underlying facts and circumstances constituted reversible error under a recent case. Defendant objected to these documents "going to the jury" on the ground that they contained hearsay information and deprived defendant of his constitutional right to confront the witnesses. The objection was overruled and the document went into evidence as an exhibit for the State. The admission of the underlying facts was objectionable because it stated that the person living in the house had a criminal background, and it was believed he might have been involved. Thus, the objectionable evidence linked defendant to a known criminal indicating guilt by association. These same documents were introduced into evidence on the motion to suppress, which was heard preliminary to trial on the merits. There was no

need to <u>introduce</u> these <u>documents</u> on the hearing of the case in chief. It was the trial judge's responsibility to determine the admissibility of the fruits of the search not the jury.

Outcome

The court reversed the conviction and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > General Overview

Governments > Courts > Judges

HN1 [Search Warrants, Confidential Informants

The essence of "reliability" may be found in an informant's statement of facts rather than an allegation of mere conclusory suspicion. An informant who alleges he is an "eyewitness" to an actual crime perpetrated demonstrates sufficient reliability of the person. The rationale behind requiring a showing of credibility and reliability is to prevent searches based upon an unknown informant's tip that may not reflect anything more than idle rumor or irresponsible conjecture. Thus, without the establishment of the probability of reliability, "neutral and detached magistrate" could not adequately assess the probative value of the tip in exercising his judgment as to the existence of probable cause. Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, which could also affect their credibility. However, eyewitness observers are seldom involved with the miscreants or the crime. They are not passing along idle rumor, for they either have been the victims of the crime or have otherwise seen some portion of it. A "neutral and detached magistrate" could adequately assess the probative value of an eyewitness's information because, if it is reasonable and accepted as true, the magistrate must believe that it is based upon firsthand knowledge. Thus, the Aguilar and Spinelli requirements are limited to the informant situation only.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

HN2 Search & Seizure, Warrants

The Fourth Amendment's commands, ail like constitutional requirements, are practical and abstract. If the teachings of the court's cases are to be followed and the constitutional policy served, affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Criminal Law & Procedure > Preliminary
Proceedings > Preliminary Hearings > Evidence

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > Preliminary
Proceedings > Preliminary Hearings > General
Overview

Criminal Law & Procedure > ... > Entry of

Pleas > Guilty Pleas > Voluntariness

HN3[Preliminary Hearings, Evidence

The preliminary hearing on the question of the admissibility of a confession must be in the absence of the jury and should be conducted before the trial on the merits begins. The State has the burden of proving the voluntariness of a confession. This burden is met by testimony of an officer that the confession was voluntarily made without any threats, coercion, or offer of reward. Such testimony makes out a prima facie case for the State on the question of voluntariness. When, after the State has made out a prima facie case as to the voluntariness of the confession, the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was made, or give an adequate reason for the absence of any such witness. In every case where the defendant takes the stand after the State has made a prima facie case of voluntariness and testifies to any fact which, if true, would tend to show that the confession was not voluntary, the State should offer all the officers who were present when the accused was questioned or give an adequate reason for the absence of any such witness.

Civil Procedure > Judicial
Officers > Judges > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > General Overview

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Rule Application & Interpretation

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Evidence > Relevance > Preservation of Relevant

Evidence > Exclusion & Preservation by Prosecutors

HN4[♣] Judicial Officers, Judges

It is the judge's responsibility to determine the admissibility of the fruits of the search - not the jury.

Counsel: Thomas R. Trout, New Albany, for Appellant.

A. F. Summer, Atty.Gen. by Henry T. Wingate, Sp.Asst.Atty.Gen., Jackson, for Appellee.

Judges: Gillespie, Smith and Walker, JJ. Gillespie, Chief Justice, for the Court, wrote the opinion. Patterson and Inzer, P. JJ., and Smith and Broom, JJ., concur. Sugg, Robertson, Walker and Lee, JJ., dissent.

Opinion by: GILLESPIE

Opinion

[*435] This is an appeal by Darrell Dean Holt from a conviction in the Circuit Court of Washington County of the crime of armed robbery and a sentence of fifteen years.

The Kentucky Fried Chicken establishment located on Alexander Street in Greenville, Mississippi, was robbed by two black males in the late afternoon. One of the robbers had an unusual hair style in that it was parted in the middle and was very puffy. He wore a beard and a mustache. This individual was dressed in black or dark blue pants, a white T-shirt, and a dark jacket. The other was wearing a maroon jacket and maroon pants. No customers were in the store, the two cooks were in the rear, and Lois Boyd, the cashier, was in the front of the establishment. One of the robbers got a Pepsi-Cola out of the box and paid [**2] for it with a dollar bill, and when Lois Boyd opened the cash register to make change, the robber pointed a chrome-plated gun at her and said, "This is a hold-up." The robbers took between \$60 and \$70 in cash from the register and fled down Cately Street. A witness who observed the robbers entering the Kentucky Fried Chicken establishment also saw them flee, one of them holding his pocket and the other carrying a Pepsi-Cola or Coca-Cola bottle. They ran north on Cately Street toward O'Hea Street. A short distance from the street a third black male who had been waiting in the area joined them. Mrs. Camel, who lived at 237 Cately Street, heard someone running and

looked out the window, and saw a young black male wearing a maroon colored two-piece suit enter the back door of Jo Jo Simpson's residence. The Simpson house is located at 623 O'Hea Street, and the rear door where the man entered was about ten feet from Mrs. Camel's house.

The robbery occurred at approximately 4:30 P.M., and the police were immediately notified. Lt. Vick of the Greenville Police Department was a short distance from the Kentucky Fried Chicken establishment when he got the radio message of the robbery. [**3] He undertook to make an immediate investigation by talking to the people working in the victimized establishment and then proceeded up Cately Street, where he talked to two people, including Mrs. Camel. Lt. Vick then verified that the house where the maroon-clad man had entered was the house of Jo Jo Simpson, and when he was talking to Mrs. Camel he saw a dollar bill lying on the back steps where entrance was made into the rear door of 623 O'Hea Street. Lt. Vick kept in radio contact with Chief Skinner and involved Chief Skinner as the investigation progressed while other officers were proceeding to obtain a search warrant on the information furnished by Lt. Vick.

A search warrant was obtained for a three-room house numbered 623 O'Hea Street and when the officers went to this residence with a search warrant they found the defendant hiding in a closet and a person named Henry Parker sitting on the bed in the middle room. Underneath the bed was a pair of maroon pants and a maroon jacket was hanging in the bathroom. A chrome pistol was found above the closet where defendant Holt was hiding and his hair was "messed up" but the remains of the center part were visible. The police [**4] recovered \$65 in currency from a bag hidden behind the bathtub. A black jacket and a Pepsi-Cola bottle were also found.

WAS THE SEARCH LAWFUL?

It is appropriate to state at the outset of the discussion that counsel for defendant conceded in oral argument that the police had probable cause in fact to justify searching the residence in question, but contend that the affidavit is insufficient under the test laid down in Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The Court is of the opinion that Lt. Vick had sufficient information that the robbers had entered 623 O'Hea

Street, which was only about 175 feet from the Kentucky Fried Chicken establishment. The employees of the victimized establishment told Lt. Vick how the robbers were dressed and the [*436] direction which they ran up Cately Street after the robbery. Mrs. Crumbly gave additional information and Mrs. Camel, whose house was only about ten feet from the back door of 623 O'Hea Street, heard the commotion of people running, looked out and saw a black male enter the rear of the O'Hea Street address. [**5] Lt. Vick also had been told that one of the robbers was holding his pocket and another was carrying a Pepsi-Cola bottle. This was only fifteen or twenty-five minutes after the robbery and at that time and at the time the search was made Lt. Vick knew that a felony had been committed, and had probable cause to believe that the perpetrators of this crime as well as evidence of the crime were in the residence at 623 O'Hea Street. Under Mississippi Code Annotated section 99-3-7 (1972), the officers had a right to enter the residence to arrest the robbers and make an appropriate search of the residence. Cf. Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

The underlying circumstances prepared by the officers only fifteen to twenty-five minutes after the robbery occurred are in the following words:

This date two black males went into the Kentucky Fried Chicken and robbed an employee, using a small caliber pistol. Taken was about \$250.00. These two persons ran back north toward O'Hea Investigating Street, according to witnesses. officers located a Davanna Camel, 237 Cately, who stated about this time she heard someone running, looked out, and [**6] saw a negro male, wearing maroon pants and jacket, enter the back door of 623 Ohea Street. This fit the description of one of the robbers. Lt. D. Vick checked around this area and saw a one dollar bill in the back yard. The person living in this house Joe Earl Simpson, has a criminal background with this department, and it is believed he might be involved. Based on the above information it is believed whoever robbed the above location ran into this house.

We are also of the opinion that the affidavit for the search warrant under these circumstances was sufficient. The affidavit was made by Officer Cochran who joined Lt. Vick in the investigation a few minutes after the robbery. We are not dealing with probable cause based upon information furnished by an anonymous tip or a police informant. Eyewitnesses

furnished the basis of the information. Under the emergency surrounding the circumstances of securing the search warrant, the officers apparently did not get the names of the people who worked in the victimized establishment, nor did they state in the affidavit the witnesses who told the officers of the persons running north on O'Hea Street that fitted the description [**7] of the robbers. This could only have been information furnished by eyewitnesses. Thus they were identifiable if not identified. This was a reasonable inference that the magistrate could draw from the affidavit. Also the details given in the affidavit are self-verifying and, of course, Mrs. Camel was identified in the affidavit as having seen the maroon-clad individual enter 623 O'Hea Street.

in <u>Cundiff v. United States</u>, 501 F.2d 188 (8th Cir. 1974), it is stated:

Defendant contends here that these facts, disclosed in the affidavit for search warrant executed by Detective Hatfield, failed to meet the requirements set out in Spinelli. More particularly he protests the "failure" to set forth underlying information so that the magistrate could determine the credibility of the "hearsay" information given by the informers. Defendant fails to note the important distinction between an informant who divulges evidence of a crime obtained from sources unknown to the affiant or magistrate and an individual who is an "eyewitness" and only relates matters gathered from his own observation. As we stated in McCreary v. Sigler, 406 F.2d 1264, 1269 (8th Cir.), cert. denied, [**8] 395 U.S. 984, 89 S. Ct. 2149, 23 L. Ed. 2d 773 (1969):

HN1[1] The essence of "reliability" may be found in an informant's statement of facts rather than an allegation of mere conclusory suspicion. An informant who alleges he is an "eyewitness" to an actual crime perpetrated demonstrates sufficient reliability of the person.

[*437] 501 F.2d at 189-190.

And in <u>United States v. Bell. 457 F.2d 1231 (5th Cir. 1972)</u>, it was said:

The rationale behind requiring a showing of credibility and reliability is to prevent searches based upon an unknown informant's tip that may not reflect anything more than idle rumor or

Thus, without the irresponsible conjecture. establishment of the probability of reliability, a "neutral and detached magistrate" could not adequately assess the probative value of the tip in exercising his judgment as to the existence of probable cause. Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, and this circumstance could also affect their credibility. None of these considerations is present in the eyewitness situation such as was present here. observers are seldom [**9] involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they either have been the victims of the crime or have otherwise seen some portion of it. A "neutral and detached magistrate" could adequately assess the probative value of an eyewitness's information because, if it is reasonable and accepted as true, the magistrate must believe that it is based upon Thus we conclude that firsthand knowledge. Aguilar and Spinelli requirements are limited to the informant situation only. 457 F.2d at 1238-1239.

This case presents an example of the difficulty police have in putting in affidavit form information they have. The Supreme Court of the United States has never departed from the statement made by Mr. Justice Goldberg in <u>United States v. Ventresca</u>, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), as follows:

These decisions reflect the recognition that HN2[*] the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one here, must be tested involved [**10] interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. 380 U.S. at 108, 85 S. Ct. at 746, 13 L. Ed. 2d at 689.

Chief Justice Burger affirmed the foregoing quotation from Ventresca in <u>United States v. Harris</u>, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).

Citing the earlier case of <u>Jones v. United States</u>, 362 <u>U.S. 257</u>, 80 <u>S. Ct. 725</u>, 4 <u>L. Ed. 2d 697 (1960)</u>, the Court in *Harris* stated:

Both recount personal and recent observations by an unidentified informant of criminal activity, factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in <u>Spinelli, supra</u>, in which the affidavit failed to explain how the informant came [**11] by his information. <u>403 U.S. at 579, 91 S. Ct. at 2079-2080, 29 L. Ed. 2d at 731.</u>

We are of the opinion that a magistrate should consider, and no doubt did consider, in issuing the search warrant involved in the present case that witnesses to a robbery and witnesses who see robbers fleeing are not likely to fabricate the facts.

The affidavit in this case is about as definite as one could expect the average policeman to make under the circumstances under which police officers work, especially in the wake of a violent crime. There is nothing in this record to indicate that the police officers were callous or indifferent to the Fourth Amendment rights of the defendant. We hold that the affidavit was sufficient.

[*438] WAS THE CONFESSION ADMISSIBLE?

The record shows without dispute that the Miranda warning was given the defendant prior to his confession. The defendant was a young man about nineteen years of age, a high school graduate, and at the time of the incident involved in this case, had finished nearly one year of college. The basis for defendant's argument that the confession was not shown to be voluntary is the testimony of the defendant at the suppression [**12] hearing that Officer Sweeden told defendant that things would be easier on him if he told the truth. It is contended that under Robinson v. State, 247 Miss. 609. 157 So.2d 49 (1963), and Lee v. State, 236 Miss. 716. 112 So.2d 254 (1959), the confession was not shown to be voluntary because, he contends, that at no point during the motion to suppress was Officer Sweeden asked if he made the statement.

The State has the burden of proving the voluntariness of the confession. In the present case, Officers Sweeden and Jennings testified that no promises or threats were made and they denied in detail that the officers made any threats or promises of reward, immunity from prosecution, or promise of preferred treatment in order to get the confession. After the officers testified, the defendant took the stand and stated that Officer Sweeden told him: "Things will be easier for you if you will tell me the truth, and it will be easier for me, too, you know." Neither Sweeden nor Jennings were recalled by the prosecution to either affirm or deny that the statement was made. We reiterate the procedure laid down by this Court in Agee v. State, 185 So.2d 671 (Miss. 1966), wherein [**13] the Court held:

- <u>HN3</u>[*] 1. The preliminary hearing on the question of the admissibility of a confession must be in the absence of the jury and should be conducted before the trial on the merits begins.
- 2. The State has the burden of proving the voluntariness of a confession. This burden is met by testimony of an officer that the confession was voluntarily made without any threats, coercion, or offer of reward. Such testimony makes out a prima facie case for the State on the question of voluntariness.
- 3. When, after the State has made out a prima facie case as to the voluntariness of the confession, the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was made, or give an adequate reason for the absence of any such witness.

The foregoing rules have been stated in numerous cases.

We strongly emphasize that in every case where the defendant takes the stand after the State has made a prima facie case of voluntariness and testifies to any fact which, if true, would tend to show that the confession was not voluntary, [**14] the State should offer all the officers who were present when the accused was questioned or give an adequate reason for the absence of any such witness.

However, in the instant case, we hold, as we did in <u>Tate v. State</u>, <u>317 So.2d 23 (Miss. 1975)</u>, that the testimony of the officers who testified before the defendant was sufficient denial of the defendant's claim that Officer Sweeden offered an inducement if he confessed.

DID THE ADMISSION INTO EVIDENCE OF THE AFFIDAVIT FOR THE SEARCH WARRANT INCLUDING THE UNDERLYING FACTS AND CIRCUMSTANCES CONSTITUTE REVERSIBLE ERROR?

When putting on the State's case-in-chief, Officer Cochran was asked to identify the search warrant and the affidavit for the search warrant including the statement of the underlying facts and circumstances supporting the affidavit, the State then offered these <u>documents</u> into evidence. The defendant objected to these <u>documents</u> "going to the jury" on the ground that they contained hearsay information and deprived [*439] the defendant of his constitutional right to confront the witnesses. The objection was overruled and the <u>document</u> went into evidence as Exhibit 2 for the State.

The admission into evidence [**15] of the affidavit for the search warrant, including the statement of the underlying facts, was reversible error under the recent case of Sisk v. State, 290 So.2d 608 (Miss. 1974). The admission of the underlying facts and circumstances was particularly objectionable because it stated that the person living in the house, "Joe Earl Simpson, has a criminal background with this department, and it is believed he might be involved." Thus, the objectionable evidence linked the defendant to a known criminal, indicating guilt by association. These same documents were introduced into evidence on the motion to suppress which was heard preliminary to trial on the merits. After the trial judge overruled the motion to suppress and had received in evidence on the suppression hearing the affidavit for the search warrant and other <u>documents</u>, there was no need to <u>introduce</u> these documents on the hearing of the case in chief. HN4 1 It is the judge's responsibility to determine the admissibility of the fruits of the search - not the jury. The instructions given by the trial judge directed the jury that "the evidence which you are to consider consists of the testimony of the witness and the exhibits offered [**16] and received."

Because of the admission into evidence of the affidavit for the search warrant for consideration by the jury, this cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

PATTERSON and INZER, P.JJ., and SMITH and BROOM, JJ., concur.

SUGG, ROBERTSON, WALKER and LEE, JJ., dissent.

Dissent by: SUGG

Dissent

SUGG, Justice, dissenting:

The majority reverses this case solely because the affidavit, including the underlying facts and circumstances, were <u>introduced</u> in evidence for consideration by the jury. I dissent for several reasons.

First, there is considerable doubt whether the statement of underlying facts and circumstances attached to the search warrant was submitted to the jury. On the trial of the case when the <u>document</u> was offered there was an off-the-record discussion at the bench at the request of defense counsel out of the hearing of the jury. The court reporter was called to the bench and objection to the <u>introduction</u> of the affidavit and search warrant was made outside the hearing of the jury. This leads me to the conclusion that the trial judge was familiar with <u>Sisk</u> v. State, 290 So.2d 608 (Miss. 1974) in which we stated:

Of [**17] course, when the fruits of a search are objected to, the state must establish the validity of the search out of the presence of the jury. The affidavit and search warrant, if the search were made by authority of a search warrant, must be produced and made a part of the record, but the documents are not for the consideration of the jury. (290 So.2d at 610).

I assume the trial judge followed the mandate of *Sisk* that the <u>documents</u> are not to be considered by the jury and withheld them from the jury.

Second, I dissent because the objection to the underlying facts and circumstances was made on the ground that it contained hearsay information and deprived the defendant of his right of confrontation with witnesses against him under the United States and the Mississippi Constitutions was not well taken. All of the persons named in the underlying facts and circumstances were offered as witnesses by the state and were cross examined by the defendant. Therefore, the defendant was not denied right to confront witnesses against him.

Third, I am of the opinion that, even if the statement of underlying facts and circumstances was shown to the jury, it was harmless error under [**18] Miss.Sup. Court Rule 11. The State in its brief, said, "Of the mountain of evidence against the appellant, the search warrant and affidavit constituted less than a pebble." This is a true statement [*440] because the evidence for the State established the commission of the crime, the flight path the robbers took, the gun used was recovered from the

very closet in which the defendant was hiding at the time of his arrest, the stolen money was discovered in the house, the defendant matched the description of one of the robbers, the defendant confessed to the crime and did not deny that he committed the crime at the trial. Miss.Sup.Court Rule 11 provides that no judgment shall be reversed for the improper admission of evidence unless it shall affirmatively appear from the whole record that such judgment has resulted in a miscarriage of justice. It affirmatively appears from the record that defendant is guilty, he offered no defense, a fair jury could return no verdict other than guilty; therefore, defendant's conviction should be affirmed.

ROBERTSON and LEE, JJ., join this dissent.

WALKER, J., joins this dissent in part.

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Document (1)

1. Young v. State, 679 So. 2d 198

Client/Matter: -None-

Search Terms: documents and hearsay Search Type: Terms and Connectors

Narrowed by:

Content Type
Cases

Narrowed by Court: Mississippi

Young v. State

Supreme Court of Mississippi August 1, 1996, Decided No. 93-KA-00489-SCT

Reporter

679 So. 2d 198 *; 1996 Miss. LEXIS 416 **

FREDDIE YOUNG v. STATE OF MISSISSIPPI

Subsequent History: Habeas corpus proceeding at, Magistrate's recommendation at Young v. Epps, 2012 U.S. Dist. LEXIS 17868 (S.D. Miss., Jan. 23, 2012)

Disposition: [**1] CONVICTION OF CAPITAL RAPE AND SENTENCE TO LIFE AFFIRMED.

Core Terms

trial court, drawing, continuance, defense counsel, hearsay, anatomical, prepare, declarant, questions, Uncle, discovery violation, perpetrator, dolls, girl, indicia of reliability, young girl, cross-examination, corroborated, mistrial, cases

Case Summary

Procedural Posture

Defendant challenged a judgment by the Circuit Court of Yazoo County (Mississippi), which convicted him of capital rape and sentenced him to life imprisonment. Defendant argued that there was a discovery violation, evidence was improperly admitted, the trial court improperly threatened defense counsel with contempt, and the verdict was against the overwhelming weight of the evidence.

Overview

Defendant was convicted by a jury of raping his six-year old niece. On appeal, defendant argued that there was a discovery violation warranting a mistrial or continuance, an anatomic drawing was improperly admitted, the trial court improperly threatened defense counsel with contempt, and the verdict was against the overwhelming weight of the evidence. The court rejected the arguments and affirmed the conviction. First, the court

held that the use of an anatomical drawing by the investigator, which had been given to defendant only immediately prior to the witness taking the stand, did not prejudice defendant. The court held that defendant was not prevented from attacking the investigator's procedures. Second, the court held that the admission of the drawing was proper under Miss. R. Evid. 803(25). Third, the court held that while the trial court might have overreacted by its threat of contempt, there was no prejudice to defendant and did not show the trial court's bias. Finally, the court held that the verdict could not be found to be against the overwhelming weight of the evidence.

Outcome

The court affirmed defendant's conviction and sentence.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Continuances

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery by Defendant > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Continuances

Criminal Law & Procedure > Defenses > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Continuances

<u>HN1</u>[♣] Trials, Continuances

HN3 Sex Crimes, Sexual Assault

Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06(I)(2) provides: If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court should, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Criminal Law & Procedure > ... > Sexual
Assault > Abuse of Children > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > Elements

HN2[Examination of Witnesses, Child Witnesses

Miss. R. Evid. 803(25) states: A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. A finding that there is a substantial indicia of reliability should be made on the record. Miss. R. Evid. 803(25) comment.

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > ... > Domestic
Offenses > Children & Minors > General Overview

<u>HN4</u>[基] Sex Crimes, Sexual Assault

Miss. R. Evid. 803(25) allows statements of causation and fault and is expanded to include the identity of the perpetrator in child abuse cases.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Evidence > ... > <u>Hearsay</u> > Exceptions > General Overview

HN5 Standards of Review, Harmless & Invited Error

Where corroborative evidence exists and the <u>hearsay</u> evidence is merely cumulative, the admission may be held to be harmless.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

<u>HN6</u>[♣] Judicial Officers, Judges

Should a case arise in which it is obvious that a judge had been partial, biased or prejudiced, and that his attitude and conduct had brought about an unfair trial, the court would reverse the case and grant a new trial.

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

<u>HN7</u>[♣] Right to Appeal, Defendants

Ordinarily counsel may not complain of slight or not seriously prejudicial impropriety in remarks or comments by the court where they are provoked by himself.

Judges: MILLS, JUSTICE. PRATHER, P.J., PITTMAN, ROBERTS AND SMITH, JJ., CONCUR. SULLIVAN, P.J., DISSENTS WITH A SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., BANKS AND McRAE, JJ.

Opinion by: MILLS

Opinion

[*199] BEFORE PRATHER, P.J., ROBERTS AND

MILLS, JJ.

MILLS, JUSTICE, FOR THE COURT:

Freddie Young was convicted of capital rape before a jury empaneled in the Circuit Court of Yazoo County. From a sentence of life in prison, Young appeals his conviction to this Court.

FACTS

In April of 1992, a six-year-old female child went to school. During that week she complained to school officials of her vaginal area burning when she went to the bathroom. On or about April 8, 1992, the school reported suspected child abuse to the Yazoo County Department of Human Services. On April 9, 1992, June Harris Smith (Smith), a social worker, responded. During their first meeting, the child told Smith that she had fallen on a stick. On April 10, 1992, Smith went to the child's home and spoke to her caretaker, Contra Pleasant, an aunt. Contra Pleasant told Smith that the incident with the stick had occurred several months earlier. Pleasant related that she [**2] had bathed Young and her little brother with laundry powder, which had chapped both of them. Smith asked the aunt to take the child to see Dr. Gambrell at the King's Daughters Hospital.

Friday night, Smith received a call from the staff at the hospital informing her that they suspected child abuse. A registered nurse on duty in the emergency room related that the child had an abnormally large vaginal opening, twice the size of that of a normal six-year-old child. The child stated her name, that she had an uncle named Maine and, that she lived with her aunt. The nurse's notes from this visit state, in pertinent part, "Pt. will only tell me her name and that she has an uncle named 'Mane,' but refused to name any other male family that visits home." Dr. Larry Cooper testified that in his expert opinion a smooth object had penetrated the child's vagina. He testified that the six-year-old child did not speak to him at all, but the child mentioned Uncle Maine's name. (Uncle Maine is another male relative living in the child's household, other than the defendant.) Dr. Cooper listed this fact in his notes.

In response to the call from the hospital staff, Smith met the child in the emergency [**3] [*200] room. She sat and talked to the child for about an hour. The child related that on a school night the previous week she had been in her bed. The child shared a room with another young person. The child stated that four relatives, including Uncle Maine, were in another room

watching television. According to direct testimony of Smith, her question of the child related the following:

Q: Did she tell you what happened?

A: And then I asked her who. I said, "Who came in; who did this?" And she, as children will a lot of the time do, didn't really want to come right out with it, but she did say Fred. And I asked her who was Fred. And she said, "That's my uncle." And I asked her what did -- then I used Fred as a reference point from there on. "What did Fred do?"

Q: Did she tell you what he did once you asked her that?

A: She did. She told me that she was in the bed asleep, and that he came and got in the bed with her, and that she was on her back. She said that he got on top of her. And I said, you know, "Did you say anything?" She said, "I told him to stop, but he didn't." And she said he kept his clothes on. She said she had on a gown, a night shirt. He pulled her panties off or down [**4] and pulled his clothes down, not necessarily off. I don't remember exactly, but left his upper clothing on. He got on top of her.

By using a drawing, Smith related that the child, when asked 'what part of his body?', pointed to a space between the legs of a gender neutral figure. Smith then drew in the figure of a penis and asked the child to describe how it felt. The child said, "It was hard, and it pushed, and it hurt." Smith testified that the <u>document</u> was the most important <u>document</u> she possessed in her file regarding this case.

When Contra Pleasant returned home, she accused Freddie Young, the appellant, of raping the child. Young replied, "I never touched her."

The next morning Smith went to the home of the child with John Abel, an officer with the Yazoo City Police Department. Smith asked the child, "Now . . . are you sure this is what happened to you, and are you sure this is who did it?" The child replied affirmatively. Officer Abel corroborated that the child said her Uncle Fred did this act. Young was arrested later that day.

Elizabeth Milner (Milner), a child sexual abuse counselor, also interviewed the child. The State qualified Milner as an expert in child abuse. Milner [**5] testified that in an hour-long interview, the child played with four anatomically correct dolls, representing a man, a woman, a boy and a girl. The little girl was frightened

and did not tell a story of what happened. However, she demonstrated the experience with the dolls. Without being asked which dolls to use, the young girl demonstrated vaginal penetration using the man doll on top of the girl doll. Milner did not ask the girl who the perpetrator was, nor did the child volunteer that information.

At trial the little girl testified. Apparently she was quite scared, and refused to answer who the perpetrator was during repeated questions lasting for ten pages in the transcript. In response to the question "Who did you tell [Smith] at the hospital that hurt you?" the young girl finally answered, "Fred." On cross-examination the child stated that she had never seen the anatomical figure drawing.

j.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL, OR IN THE ALTERNATIVE, AN ADEQUATE CONTINUANCE FOR A DISCOVERY VIOLATION?

During the State's case-in-chief, Smith testified regarding her investigation of sexual abuse concerning this child. During her testimony, [**6] the defense objected that Smith was reading from a <u>document</u>. The defense requested to know the nature of the <u>document</u>. Smith testified that she was using an anatomical drawing she kept in her notes. [*201] Smith had made these notes during her emergency room visit with the child.

The defense objected that the anatomical drawing had been withheld from a discovery request. The State replied that Smith had provided the drawing only immediately prior to the witness taking the stand. The trial court excused the jury. The trial court then conducted a hearing on the discovery violation. The trial court determined that as the State was planning to solicit testimony from Smith regarding this diagram, a discovery violation had occurred. Further, the trial court found the diagram surprised the defendant. The trial court found no intentional violation by the State. The trial court granted the defense a two-day continuance pursuant to Rule 4.06 of the Uniform Criminal Rules of Circuit and County Court Practice.

When trial reconvened two days later, defense counsel renewed its request for a mistrial, or in the alternative, a longer continuance, stating it had not had an opportunity to prepare. Defense [**7] counsel stated on the record that three experts, physicians, had been contacted,

each of whom would testify that the anatomical drawing was highly suggestive to the child. Defense counsel stated that he had personally contacted each of these physicians. Defense counsel gave the trial court the telephone numbers of each physician contacted. Defense counsel stated that one physician could testify the next day and requested the continuance extend to that time. The trial court denied both motions.

On appeal, Young contends that the lower court did not grant him an adequate continuance reasonably necessary to investigate the credibility of the evidence and prepare an adequate response to it, citing <u>Box v. State, 437 So. 2d 19, 23 (Miss. 1983)</u> (Robertson, J. specially concurring).

Rule 4.06 provides, in part, that:

<u>HN1[*]</u> If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court should, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

Unif. Crim. [**8] R. Cir. Ct. Prac. 4.06(I)(2).

The State urges this Court to find that there was nothing suggestive in the method of using the drawing and therefore, the use of the drawing did not prejudice the defendant. The central question on appeal is whether the trial court's denial of one additional day of continuance was an abuse of discretion where the defendant sought expert testimony to attack the investigative procedures of a social worker.

In West v. State, this Court reviewed a discovery violation where the lower court failed to grant a sufficient delay for defense counsel to prepare for surprise expert testimony. In that case, the prosecution informed the defendant that Dr. Rodrigo Galvez, a board certified pathologist and psychiatrist, would be testifying as an expert in the field of pathology. When Dr. Galvez was examined at trial, however, the district attorney elicited testimony regarding Galvez's expertise in psychiatry. As fate would have it, this testimony, addressing the psychosexual disorder of necrophilia, became a crucial element in the State's theory of the case. When faced with defense objection, the lower court allowed Dr. Galvez to testify, but granted defense [**9] counsel, in essence, a one day continuance to prepare for the cross-examination. This Court found that this delay was insufficient. We stated:

Precisely because the prosecution's necrophilia theory was so central to the question whether West could be exposed to the death penalty, a day's break in the action was an inadequate antidote for the prosecution's discovery violation. This is the sort of prosecution theory which, had the defense known of it prior to trial, may well have altered the entire defense strategy. It is the sort of theory which would no doubt have sent the experts scurrying to the books for study and reflection. With all else that must of necessity be juggled in the course of a capital murder trial, unreality attends any suggestion that defense counsel can stop in midstream and become sufficiently [*202] informed on a subject like necrophilia to cross-examine with competence.

<u>Jenkins v. State. 607 So. 2d 1171, 1178 (Miss. 1992)</u> quoting **West v. State,** 553 So. 2d 8 (Miss.1989)

However, this Court has also stated, "By no means does this mean invariably that the defendant will be entitled to a continuance until the next term of court. There will no doubt [**10] be cases where postponement of a day or two, or in some cases even an hour or two, will suffice." Stewart v. State. 512 So. 2d 889, 892-93 (Miss.1987).

In the instant case, the trial court granted a reasonable continuance to the defendant to prepare his response to the drawing. His ability to cross-examine the witness regarding the drawing was unlimited. He had two days to prepare for his cross-examination. Finally, the evidence itself was cumulative and the facts established by the <u>document</u> were corroborated by other independent evidence. This Court does not find that the trial court abused its discretion in failing to grant an additional day.

11.

DID THE TRIAL COURT ERR IN ADMITTING AN ANATOMICAL DRAWING MADE BY JUNE HARRIS SMITH AS THE DRAWING WAS <u>HEARSAY</u>?

Immediately before the trial reconvened and, while the parties were still discussing the discovery violation, the following colloquy occurred:

BY THE COURT:

Counsel, I'm still at a loss of what these doctors are going to say other than that the picture is highly suggestive. What does that have to do with your defense in this case?

BY MR. GUY ROGERS, JR.:

If the drawing is highly suggestive and it was [**11] not the victim's testimony, that it was elicited through suggestive techniques, then my defense would be that the little girl -- that that statement should not come in because it would be highly prejudicial. It's rank hearsay, and it does not bear sufficient indignantive [sic] reliability and guarantees or trustworthiness to come into evidence.

BY THE COURT:

It can come in under 803.25, and the indignantive [sic] or trustworthiness does not fall [sic] for the tender years exception. That's a totally new exception to the <u>hearsay</u> rule under the Mississippi Rules of Evidence.

BY MR. GUY ROGERS, JR.:

Your Honor, you may be right, but I do believe that even under 803.25 there are certain fact findings that should be made regarding the reliability, even though it is a tender years exception. I may be wrong, but I still think that that finding would have to be made before that **document** could be admissible.

BY THE COURT:

Your objection is noted. The motion is denied. I want the record to clearly reflect that the Court did grant a continuance. The Court feels that the continuance that it granted was reasonable, and the Court feels that the argument that you made today as to why [**12] you need an additional continuance is not meritorious, and therefore the motion for mistrial as well as for an additional continuance will be denied.

Immediately after the trial reconvened, the State sought to admit the drawing into evidence. Young again objected to the drawing's introduction as "hearsay and highly suggestive." The trial court overruled the objection. On appeal, Young argues the statement is hearsay and the method in which Smith made the drawing is suggestive. Young, in essence, argues that his inability to cast doubt on this procedure renders his trial fundamentally unfair when the document itself was entered into evidence.

As to the first question of whether this was <u>hearsay</u>, Rule 803(25) states:

HN2 A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the

presence of the jury, that the time, content, and circumstances of the statement [*203] provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable [**13] as a witness, such statement may be admitted only if there is corroborative evidence of the act.

M.R.E. 803(25).

The Comment to Rule 803(25) states:

HN3[1] Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. Idaho v. Wright, 497 U.S. 805, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990). A finding that there is a substantial indicia of reliability should be made on the record. . . .

M.R.E. [**14] 803(25) Comment.

HN4 This rule allows statements of "causation and fault [and] has been expanded to include the identity of the perpetrator in child abuse cases." Jones v. State, 606 So. 2d 1051, 1056 (Miss. 1992).

The record is void of any hearing concerning the <u>hearsay</u> nature of this <u>document</u>. Furthermore, the trial judge stated that no requirement of indicia of reliability or guarantees of trustworthiness was necessary for evidentiary purposes. The record is also void of any evidentiary predicate being laid to admit this <u>document</u> under any other <u>hearsay</u> objection. The State did not seek its introduction under any other <u>hearsay</u> exception.

Without any hearing or findings regarding the trustworthiness of this statement, this statement was

used as substantive evidence to prove Freddie Young was the perpetrator of this crime. This Court can find no alternative to holding that the trial court erred in admitting the drawing into evidence. However, in this case, the error was harmless.

Young did not object to the oral testimony of Smith, who stated that the child identified Young. Young did object to the statement of Officer Abel that he heard the child identify Young as [**15] the perpetrator. Nevertheless, on appeal Young does not complain of this hearsay statement. Finally, the young girl herself identified Freddie Young as the perpetrator on the stand. HN5 [*] Where corroborative evidence exists and the hearsay evidence is merely cumulative, the admission may be held to be harmless. Jones v. State, 606 So. 2d 1051, 1057 (Miss. 1992)). In the present case, the evidence the jury could obtain from the anatomical drawing was repetitious of the oral testimony of Smith, to which Young did not object. Therefore, the error was harmless.

III.

DID THE TRIAL COURT ERR WHEN THREATENING DEFENSE COUNSEL WITH CONTEMPT FOR MAKING A TIMELY VALID OBJECTION IN THE PRESENCE OF THE JURY?

When the young child took the stand, she testified that she knew who Freddie Young was and identified him. The prosecutor asked the child where she was hurt, and she pointed between her legs (via a series of leading questions). The State began asking the child who hurt her there. The child did not answer. The child appeared, from the record, to be frightened and/or emotionally upset. The prosecutor continued to ask this question in various forms, leading and non-leading. The [**16] following exchange occurred:

Q: I bet everybody always want [sic] to play with a microphone, don't they? So now you have a chance to say whatever you want to say into that microphone. [*204] So you just need to go ahead and tell us who came in your room and woke you up that night. Just tell that ole microphone who it was?

BY MR. GUY ROGERS, JR:

Your honor, I'm sorry, but I object to this. I don't mean to be mean, but I've got my client to protect.

BY THE COURT:

You can sit down. Sit down.

BY MR. GUY ROGERS, JR:

l object --

BY THE COURT:

I'm going to hold you in contempt, Mr. Rogers. Sit down.

The only other prior objection during the young child's testimony was to the prosecutor's demonstrative use of anatomically correct dolls. After the exchange noted above, the questioning continued. The young girl, some time later, testified that she had told Smith that Fred had done this to her. Defense counsel made no other objections.

On appeal, Young asserts that since the admonition took place in front of the jury, it bolstered the witness's testimony in the eyes of the jury and created unfair prejudice to the defendant, because the jury would infer that defense counsel had acted [**17] improperly.

We find no cases in this jurisdiction where this Court has reviewed a trial court's admonition to cease objecting upon pain of contempt.

In commenting upon the influence a trial judge has on the jury during trial, this Court has previously said:

It is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party.

Green v. State, 97 Miss. 834, 838 53 So. 415, 416 (1910).

Green involved a judge who ran short of venire members and ordered a deputy sheriff to summon five talesmen, i.e., people summoned to serve as jurors from among by-standers at court. The stated purpose was, as the trial judge put it, "We want to break this nigger's neck." <u>Id. at 835</u>. The judge stated he made [**18] this statement in jest. <u>Id.</u> We reversed and remanded the conviction. <u>Id. at 838</u>.

We have also stated, HN6 Thould a case arise in

which it is obvious that a judge had been partial, biased or prejudiced, and that his attitude and conduct had brought about an unfair trial, the Court would reverse the case and grant a new trial." <u>Garrett v. State, 187 Miss. 441, 455, 193 So. 452, 455 (1940)</u>. **Garrett** dealt with a defendant's motion for recusal of a judge who was a friend of a prosecution witness. <u>Garrett. 187 Miss. at 452-53</u>.

In *Parker v. State*, this Court held that, <u>HN7</u>[4] "Ordinarily counsel may not complain of slight or not seriously prejudicial impropriety in remarks or comments by the court where they are provoked by himself." *Parker v. State, 401 So. 2d 1282, 1285 (Miss.1981)*.

In the present case, defense counsel did not appear to be bringing the opprobrium on themselves by questioning the trial court's ruling on any subject. Defense counsel was making an objection, the basis of which is unknown. It is apparent from the record that the trial court overreacted when he told defense counsel to sit down upon pain of contempt. However, [**19] these comments did not deny the defendant a fundamentally fair trial. <u>Garrett v. State, 187 Miss. 441, 455, 193 So. 452, 455 (1940)</u>. Therefore, the error was harmless.

IV.

WAS THE VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

On appeal, Young raises no question as to the sufficiency of the evidence, but [*205] questions the weight of it. Young points out that the statements of a six-year-old child, or repetitions of the child's statement, constituted the only evidence that he was the perpetrator. The State gained these statements, Young claims, through suggestive techniques against which he had an inadequate time to prepare. Young points out that before the interview with Smith, the name consistently mentioned was Uncle Maine. In later interviews with Milner, a child sexual abuse counselor, the young girl gave no name. Finally, Young points to the jury's difficulty with this case. The jury asked three questions of the judge, 1 which went unanswered because all the evidence was in. The jury then deadlocked, only to be broken after the lower court read a proper Sharplin charge.

[**20] These cases are always the most troublesome because of the inflammatory nature of the crime and the poor quality of evidence typically presented. This case is no different. Under the facts presented to the jury, this Court cannot find that the verdict was against the overwhelming weight of the evidence. For these reasons, we affirm.

CONVICTION OF CAPITAL RAPE AND SENTENCE TO LIFE AFFIRMED.

PRATHER, P.J., PITTMAN, ROBERTS AND SMITH, JJ., CONCUR. SULLIVAN, P.J., DISSENTS WITH A SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., BANKS AND McRAE, JJ.

Dissent by: SULLIVAN

Dissent

SULLIVAN, PRESIDING JUSTICE, DISSENTING:

I respectfully disagree with the results reached by the majority in this case. On assignment number one, the trial court did abuse its discretion when it only granted a two-day continuance to allow defense counsel to prepare for surprise evidence used by the State in violation of discovery. This is particularly true when defense counsel told the court that he had an expert witness prepared to testify that the anatomical drawing was highly suggestive and that this witness could testify the next day. It was an abuse of discretion for the trial court not to continue [**21] the trial until the expert witness was available. Twenty-four hours would have made little difference.

The majority concludes that the continuance was reasonable to allow the defendant to prepare a response, but it certainly did not allow the defendant to produce a witness in response, which was the purpose for the **Box** request in the first place.

As to assignment number three, in and of itself and taken in a vacuum, it is easy to

agree that while the trial judge's reaction was highly inappropriate it was not prejudicial; however, when viewed in light of the judge's abuse of discretion with the discovery violation and in view of the fact that the jury was hopelessly deadlocked and asked three questions of the trial court and only brought in a verdict after being given a *Sharplin* charge, I find assignment number three to be meritorious.

¹ The questions were: 1) Were there lights in the room when the alleged took place?; 2) How large is the house?; and 3) How far is the bedroom from the room where everybody was watching T.V.?

Under the totality of the circumstances of this case the trial judge abused his discretion on two occasions and as a result deprived the defendant of having a fair trial. I would reverse and remand for new trial.

LEE, C.J., BANKS AND McRAE, JJ., JOIN THIS OPINION.

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Cox v. State

Supreme Court of Mississippi August 28, 1991, Decided No. 07-KA-59331

Reporter

586 So. 2d 761 *; 1991 Miss. LEXIS 588 **

RANDY EDWARD COX a/k/a RANDY EDWARD WHITE v. STATE OF MISSISSIPPI

Prior History: [**1] Appeal No. 4720 from Judgment dated April 01, 1986, Andrew C. Baker Ruling Judge, DeSoto County Circuit Court.

Disposition: AFFIRMED AS TO THE CONVICTION FOR ARSON; REVERSED AND RENDERED AS TO THE FINDING THAT APPELLANT WAS AN HABITUAL OFFENDER AND REMANDED FOR PROPER RESENTENCING UNDER MISS. CODE ANN. § 97-17-1 (1972).

Core Terms

sentence, authenticity, confession, documents, habitual offender, trial court, admissibility, seal, arson, voluntariness, certification, recorded, copies, prior conviction, convicted, provides, burning, public record, interview, signature, felonies, public document, certified copy, <u>self-authenticating</u>, Identification, responded, domestic, exhibits, fires

Case Summary

Procedural Posture

Defendant sought review of the judgment from the Circuit Court of DeSoto County (Mississippi), which convicted defendant of arson and sentenced him to life imprisonment as a habitual offender pursuant to <u>Miss. Code Ann. § 99-19-83</u> (1990). Defendant challenged, pursuant to <u>Miss. R. Evid. 901</u> and <u>902</u>, the sufficiency of the <u>authentication</u> of the records used in the habitual offender hearing.

Overview

Defendant challenged his conviction, alleging that the

trial court erred by allowing two witnesses to testify as to the contents of defendant's confession. On appeal, the court held that defendant's confession was admissible. The State's witnesses testified that the confession was voluntarily made without any threats or coercion. Because defendant did not rebut the State's evidence, the State did not need to produce any further witnesses. Defendant also argued that the documents that the State produced during the sentencing phase were not properly authenticated. The court held that the State failed to produce evidence of a second felony conviction. The court found that the document detailing defendant's prior arrest in Tennessee and his conviction record was not properly certified under Rule 902 because the copies had only been notarized. Additionally, the copies from the Florida corrections department were not certified copies of a public record, thus inadmissible under Miss. R. Evid. 901(b)(7). Because double jeopardy barred the State from perfecting its evidence, defendant had to be resentenced under the statutory guidelines.

Outcome

The court affirmed defendant's conviction for arson, but reversed and rendered the trial court's judgment finding that defendant was an habitual offender. The court remanded the action for proper re-sentencing under Mississippi law.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > <u>Self-</u> Incrimination Privilege

Evidence > Privileges > <u>Self</u>-Incrimination Privilege > Elements

Criminal Law &

Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Evidence > ... > Exemptions > Confessions > Gener al Overview

Evidence > Privileges > <u>Self</u>-Incrimination Privilege > General Overview

Evidence > Privileges > <u>Self</u>-Incrimination Privilege > Waiver

<u>HN1</u>[♣] Procedural Due Process, Self-Incrimination Privilege

Miranda requires proof that the waiver was voluntarily, knowingly, and intelligently made. The trial judge makes that determination. Findings by a trial court that a confession was voluntary and that the confession is admissible will not be reversed by the appellate court as long as the trial court applies the correct principles of law and the finding is factually supported by the evidence.

Criminal Law &
Procedure > ... > Interrogation > Miranda
Rights > General Overview

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > Commencement of Criminal

Proceedings > Interrogation > Voluntariness

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Burdens of Proof > General Overview

HN2[🟂] Interrogation, Miranda Rights

When the voluntariness of a confession is put into

question, the defendant has a due process right to a reliable determination that the confession was in fact voluntarily given. The State bears the burden of proving all facts prerequisite to admissibility beyond a reasonable doubt. This burden is met and a prima facie case made out by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward. The defendant must offer testimony that violence, threats of violence, or offers of reward induced the confession to rebut the State's prima facie case. If the defendant does this, then the State must offer all the officers who were present when the defendant was questioned and when the confession was signed, or show why they are not present.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Evidence > ... > Exemptions > Confessions > Gener al Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > ... > Procedural Matters > Preliminary Questions > Hearings Out of Jury's Presence

<u>HN3</u>[Pretrial Motions & Procedures, Suppression of Evidence

The procedure of proving that a defendant's confession is admissible properly occurs before trial in a suppression hearing conducted out of the presence of the jury. *Miss. R. Evid.* 104.

Criminal Law & Procedure > Commencement of Criminal

Proceedings > Interrogation > Voluntariness

Evidence > ... > Exemptions > Confessions > Gener al Overview

Evidence > Burdens of Proof > General Overview

HN4[♣] Interrogation, Voluntariness

Without rebuttal from the defendant, the State does not need to produce all of the witnesses to the confession to establish voluntariness, the prima facie case is sufficient.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Findings of Fact

Evidence > Weight & Sufficiency

HN5[₺] Substantial Evidence, Findings of Fact

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, the appellate court's authority to interfere with the jury's verdict is quite limited. The appellate court proceeds by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. It gives the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty and weight that, having in mind the beyond the reasonable doubt standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond the appellate court's authority to disturb.

Criminal Law & Procedure > ... > Arson > Simple Arson > General Overview

Criminal Law & Procedure > Criminal Offenses > Arson > General Overview

<u>HN6</u>[基] Arson, Simple Arson

<u>Miss. Code Ann. § 97-17-1</u> (1972) defines arson as: Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house.

Criminal Law & Procedure > ... > Sentencing

Alternatives > Probation > Eligibility

Criminal Law & Procedure > Criminal Offenses > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

Criminal Law & Procedure > Sentencing > Suspension

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN7[2 Probation, Eligibility

Miss. Code Ann. § 99-19-83 (Supp. 1990), entitled Sentencing of habitual criminals to life imprisonment, provides: Every person convicted in Mississippi of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one year or more in any state and/or federal penal institution, whether in Mississippi or elsewhere, and where any one of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

Evidence > Burdens of Proof > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

<u>HN8</u>[♣] Criminal History, Prior Felonies

Miss. Code Ann. § 99-18-83 (Supp. 1990) places upon the State the burden of proving: (1) that the defendant was convicted of two prior felonies, (2) one of which was a violent crime, and (3) that the defendant had been sentenced to and served at least one year on each of the prior felonies.

Evidence > Authentication > General Overview

Evidence > Authentication > General Overview

HN9 Evidence, Authentication

Miss. R. Evid. 901(a), (b)(7), entitled Requirement of <u>Authentication</u> or Identification, states: The requirement of <u>authentication</u> or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Evidence > <u>Authentication</u> > <u>Self-Authentication</u>

Governments > Local Governments > Employees & Officials

Transportation Law > Water
Transportation > Canals > Panama Canal

HN10 Authentication, Self-Authentication

Miss. R. Evid. 902(1), (2) and (4) provides: Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in Rule 902(1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Rule 902(1), (2), or (3) or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

HN11[Evidence, Authentication

Exhibits that are not properly <u>authenticated</u> cannot be accepted as evidence.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN12 Procedural Due Process, Double Jeopardy

Re-prosecution of an habitual offender is barred where there is not sufficient evidence to support a conviction apart from the evidence erroneously admitted by the trial judge. Although the State "could possibly cure" this error if it were given a second opportunity, the essence of the double jeopardy prohibition is to limit the State to one fair opportunity to offer what proof it could assemble.

Counsel: FOR APPELLANT - Paul R. Scott, WILROY SCOTT & RUTHERFORD, Hernando, Mississippi.

FOR APPELLEE - Mike C. Moore, Attorney General, Jackson, Mississippi.

Judges: Prather, Justice, for the Court. Roy Noble Lee, C.J., Hawkins and Dan Lee, P.J., Robertson, Sullivan, Pittman, Banks, and McRae, JJ., concur.

Opinion by: PRATHER

Opinion

[*762] Involved in this appeal is the question of the sufficiency of <u>authentication</u> of records used in a habitual offender hearing under <u>Miss. Code Ann. § 99-19-83</u> (Supp. 1990). Randy Edward Cox, a/k/a Randy Edward White (Cox) was convicted in the Circuit Court of DeSoto County of arson. After a separate sentencing hearing, Cox was sentenced as an habitual offender under <u>Miss. Code Ann. § 99-19-83</u> (Supp. 1990), to life, without the reduction or suspension of sentence, or

eligibility for parole or probation, in the Mississippi Department of Corrections. This Court affirms the conviction, [**2] but reverses and renders the sentence as an habitual offender.

I. FACTS

A fire originated in the home of Eddie and Marjorie Sullivan in Southaven, DeSoto County, Mississippi, during the early morning hours of April 14, 1985. The Sullivans were out of town, but they left the house under the supervision of their son, Danny Sullivan.

William Marion Sullivan, of the Southaven Fire Department, responded to the fire and stated that upon entering the house he saw one fire and heard at least one more. Ronald L. White, Fire Marshall of the Southaven Fire Department, trained in arson and fire investigation, also responded to the Sullivan fire and began to investigate to determine the fire's origin and its cause. Fire Marshall White determined that there were at least three fires in the house and that they were all deliberately set.

On May 27, 1985, in connection with his investigation of the Sullivan fire, Fire Marshall White made a trip to the Criminal Justice Complex of Memphis, Tennessee, to interview Randy Edward Cox, who was being held there. Fire Marshall White advised Cox of his constitutional rights and informed him that he was the subject of an arson investigation. Cox waived his rights [**3] and signed a waiver of rights form. The form was also signed by Fire Marshall White and Lt. D. E. Strauser of the Metro Arson Division of Memphis, who was also present during the interview. Cox then made a statement describing the handwritten surrounding the fire and admitting to setting one of the three fires, after Danny Sullivan started the first one. Cox responded negatively to a question as to whether he was "threatened, abused, kicked, beaten, or promised anything in order to obtain the statement."

During the trial, the State questioned Fire Marshall White about his interview with Cox and the written statement. ¹ Cox [*763] objected to this testimony

¹A written confession was signed by Cox relating to charges of armed robbery of Danny Joe Sullivan and the grand larceny of an automobile belonging to Ed Sullivan's corporate business, as well as to the charge of arson of the Sullivan home. Because of the inability to refer to the other crimes, the State did not introduce the written statement, but brought the witnesses to the confession to testify to the arson charge alone.

citing the State's failure to show that the confession was freely and voluntarily given. This was Cox' first challenge to the voluntariness of the confession. Outside the jury's presence, the trial court heard the suppression motion and found that the State had laid the necessary predicate of voluntariness to admit the evidence.

[**4] Fire Marshall White then testified before the jury that Cox had admitted in his interview to setting one of the fires by throwing a burning rag into a closet. Further testimony about the interview was elicited from Lt. Strauser. Lt. Strauser testified that Cox was advised of his constitutional rights and that he agreed to waive them. Lt. Strauser responded negatively when asked if Cox was in any way coerced, threatened, promised anything, or abused into making the statement. He responded affirmatively when asked if Cox knowingly, voluntarily and intelligently gave the statement. Lt. Strauser also testified that Cox admitted to setting one of the fires by picking up a burning rag and throwing it in a closet.

The State rested. Cox did not testify in his own behalf and did not call any witnesses. The jury returned a verdict of guilty. A separate hearing was held on the habitual offender portion of the indictment. The trial court found Cox to be an habitual offender and sentenced him to life without the possibility of reduction or suspension of sentence, or eligibility for parole or probation under \S 99-19-83.

Cox appeals his conviction and sentence, and asserts as error: (1) that the [**5] trial court erred in allowing Fire Marshall White and Lt. Strauser testify as to the contents of his written statement; (2) that the verdict was not supported by evidence; (3) and that the trial court erred in allowing documents and letters into evidence during the sentencing phase of his trial.

II. VOLUNTARINESS OF COX' CONFESSION

Cox' first assignment of error is that the trial court erred in admitting the testimony of Fire Marshall White and Lt. Strauser about his confession for failure to prove its voluntariness, and for the State's failure to present all witnesses to the confession.

The United States Supreme Court has pronounced the law regarding the admissibility of a defendant's waiver of his privilege against <u>self-incrimination</u> under the Fifth Amendment. <u>Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. <u>HN1</u> Miranda requires proof that the waiver was voluntarily, knowingly, and</u>

intelligently made. The trial judge makes that determination. Findings by a trial court that a confession was voluntary and that the confession is admissible will not be reversed by this Court as long as the trial court applies the correct principles [**6] of law and the finding is factually supported by the evidence. <u>Davis v. State.</u> 551 So.2d 165, 169 (Miss. 1989); <u>Dedeaux v. State.</u> 519 So.2d 886 (Miss. 1988).

HN2[*] When the voluntariness of a confession is put into question, the defendant has a due process right to a reliable determination that the confession was in fact voluntarily given. Stokes v. State, 548 So.2d 118, 121 (Miss. 1989). The State bears the burden of proving all facts prerequisite to admissibility beyond a reasonable doubt. Davis. 551 So.2d at 169; Jones v. State, 461 So.2d 686, 697 (Miss. 1984); Neal v. State, 451 So.2d 743, 753 (Miss. 1984). This burden is met and a prima facie case made out by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward. The defendant must offer testimony that violence, threats of violence, or offers of reward induced the confession to rebut the State's prima facie case. If the defendant does this, then the State must offer all the officers who were present when the defendant was questioned [**7] and when the confession was signed, or show why they are not present. Tolbert v. State, 511 So.2d 1368, 1376 (Miss. 1987), [*764] quoting Agee v. State, 185 So.2d 671, 673 (Miss. 1966).

HN3[1] This procedure properly occurs before trial in a suppression hearing conducted out of the presence of the jury. M.R.E. 104. In the case sub judice no pretrial motion to suppress was filed. The trial court conducted a hearing in chambers during the trial, after Cox' in-court objection to the voluntariness of the confession. The trial court found that the State had established a "proper predicate" on the testimony of Fire Marshall White. The onus was then on Cox to provide other evidence or testimony on the voluntariness issue as rebuttal to the State's predicate. Cox did not rebut the State's predicate during argument on the motion. HN4[4] Without rebuttal from the defendant, the State does not need to produce all of the witnesses to the confession to establish voluntariness, the prima facie case is sufficient. See Hemmingway v. State, 483 So.2d 1335, 1337 (Miss. 1986). Nevertheless, both officers who were present at the interview testified at trial after the court ruled [**8] their testimony regarding the confession admissible.

This Court holds that the trial court did follow the correct legal standards to determine the admissibility of the contents of Cox' confession to the officers and that there was substantial evidence to support his finding of voluntariness. Having met this test this Court may not disturb the trial court's finding. <u>Jones. 461 So.2d at 697</u>. This assignment is without merit.

III. SUFFICIENCY OF THE EVIDENCE

Cox asserts that the evidence offered by the State was not sufficient to support the verdict of guilty. The standard of review for challenges to the legal sufficiency of the evidence is provided in <u>Benson v. State, 551 So.2d 188 (Miss. 1989)</u>. The Court stated:

Recently in <u>McFee v. State</u>, 511 So.2d 130 (Miss. 1987), this Court repeated its standard of review for challenges to the legal sufficiency of the evidence.

HN5 [] When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence-not just that supporting the case for the prosecution -in [**9] the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty and weight that, having in mind the beyond the reasonable doubt standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. See e.g., Gavin v. State, 473 So.2d 952, 956 (Miss. 1985); May v. State, 460 So.2d 778, 781 (Miss. 1984).

<u>McFee at 133-134</u>. **See also** <u>Winters v. State, 449</u> <u>So.2d 766 (Miss. 1984)</u>.

Benson, 551 So.2d at 193.

Cox' challenge to the legal sufficiency of the evidence of his arson conviction rests on the argument that Danny Sullivan set the initial fire in the Sullivan home. The testimony of Fire Marshall White and Lt. Strauser shows that Danny Sullivan may have originally started the first fire. However, the two also testified that Cox stated [**10] to them that he started one of the fires by taking a burning rag from another fire and throwing it into a closet. Miss. Code Ann. § 97-17-1 (1972) states:

HN6[*] Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house

It is clear from the evidence that Cox participated as a principal with Danny Sullivan in burning the Sullivan home. The evidence in the record does not support Cox' argument that reasonable persons could find him not guilty of arson beyond a reasonable doubt. Disturbance of this verdict is beyond the authority of this Court.

[*765] IV. ADMISSION OF DOCUMENTS AS COMPETENT EVIDENCE OF PRIOR CONVICTIONS

Finally, Cox asserts that documents used as exhibits to sentence him as a habitual offender under $\frac{6.99-19-83}{2}$ were not admissible evidence of a prior conviction. The State produced a Mississippi conviction of robbery with a deadly weapon as evidence of a prior conviction and sought to prove a second prior conviction, as required by the statute. Cox does not challenge the Mississippi conviction, but challenges only the out-of-state exhibits presented to prove the second prior conviction. [**11]

[**12] The State offered as evidence of a second conviction an exhibit prepared by the Bureau of Identification of the Memphis Police Department, which detailed his prior arrest and conviction record from the Federal Bureau of Investigation. Cox objected to this

² § 99-19-83. <u>HN7</u>[*****] Sentencing of habitual criminals to life imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation. Miss. Code Ann. § 99-19-83 (Supp. 1990).

This statute <u>HN8[*]</u> places upon the State the burden of proving:

(1) that the defendant was convicted of two prior felonies, (2) one of which was a violent crime, and (3) that the defendant had been sentenced to and served at least one year on each of the prior felonies. <u>McLamb v. State. 456 So.2d 743. 746 (Miss. 1984)</u>.

exhibit and questioned the authenticity of the document, due to the fact that it was attested to by a notary public and not by a clerk of court or official custodian of records. The State then offered a letter from J. W. Crawford, Correctional Records Supervisor III of the Reception and Medical Center of the Department of Corrections for the State of Florida that was also sworn before a notary public. The letter stated that Cox was sentenced for the crime of burglary and that he was detained by the Department of Corrections from November 3, 1980, until he escaped on September 4, 1981. Cox objected to the admission of the letter as an exhibit on the ground that the letter was hearsay.

The State additionally offered as an exhibit a group of documents with a cover letter from James T. Wainwright, Superintendent of the Florida Department of Corrections. The documents were uncertified copies of commitment papers, judgment of conviction, [**13] fingerprints and photographs from the official file copies. Some of the copied documents had the seal of the clerk of the convicting court; none were certified under 28 U.S.C.A. § 1739, which provides the method of certifying documents for transmittal between states. Cox again objected to the documents on the ground that the documents were not properly authenticated and only notarized by a notary public. The trial court overruled the objection at that point and received the documents into evidence; the trial court then found that Cox was a habitual offender.

Cox argues that if the actual judgment of conviction is not introduced, conviction may only be proved by documents accorded equivalent evidentiary weight by statute. *DeBussi v. State, 453 So.2d 1030 (Miss. 1984)*. However, DeBussi was decided before the adoption of the Mississippi Rules of Evidence, effective January 1, 1986. This trial was held in February of 1986. The issue of whether a document is legally authentic as to be admissible evidence of prior convictions is now governed by Rules 901 and 902 of the Mississippi Rules of Evidence. Compare King v. State, 527 So.2d 641, 646 (Miss. 1988). [**14] Rule 901 states:

$\underline{\it Rule~901}$. REQUIREMENT OF $\underline{\it AUTHENTICATION}$ OR IDENTIFICATION

(a) General Provision. <u>HN9[*]</u> The requirement of <u>authentication</u> or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

[*766] (b) Illustrations. By way of illustration only, and

not by way of limitation, the following are examples of <u>authentication</u> or identification conforming with the requirement of this rule:

. . . .

(7) Public Records or Reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

M.R.E. 901(a), (b)(7), (1990). Rule 902 provides:

RULE 902. SELF-AUTHENTICATION

<u>HN10</u>[*] Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or of [**15] the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
- (2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

. . . .

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

. . .

M.R.E. 902(1), (2) and (4), [**16] (1990).

This Court, in the pre-rule case of <u>Monroe v. State</u>, <u>515</u> <u>So.2d 860 (Miss. 1987)</u>, anticipated the issue raised in this case. In Monroe, this Court stated:

At the outset we must make clear that this issue is not governed by the Mississippi Rules of Evidence, effective January 1, 1986. Monroe was tried in early October 1985, so we must rely on our statutory and common law rule of evidence.

Similar future questions must be governed by $\underline{M.R.E.}$ $\underline{901(7)}$, $\underline{902(1)}$ and $\underline{(4)}$. See 5 D. Louisell & C. Mueller, Federal Evidence, § 532 (1981) for a helpful analysis of a similar problem under the Federal Rules of Evidence.

Since certified copies are admissible, certification becomes the <u>authenticating</u> mechanism for admitting copies as originals. The certification provides <u>self</u> authenticity by which a copy might be admitted without further assurances of its genuineness. This statute is no more than a reflection of this country's common law.

As a substitute for an original public record, which ought not to be constantly removed, our courts have long recognized the original should be permitted to be evidenced by "a copy given by a public officer whose duty it is to keep the original."

[**17] 5 J. Weinstein & M. Berger, Weinstein's Evidence, § 902(4)[01], at 902-25 (1983).

Theoretically, however, this certification contains two components. Even if the custodian has made his attestation, the court must know that the custodian's attestation is genuine. McCormick states the issue thusly:

How is the court to know without proof that the signature or seal appearing [*767] on the writing is actually that of the official whose name and title are recited?

McCormick on Evidence, § 228 at 700 (E. Cleary ed. 1984). The authors note that many states have eliminated this hurdle by statute. We think this was the purpose of <u>Miss.Code Ann. § 13-1-77</u> (1972). Our statute provides that a certified copy from the custodial state officer "shall be received in evidence in all cases." We think the intent of the statute was to allow domestic judicial records to be received without the need of <u>authenticating</u> the certification. We pause to note that this seems to be the position of our new Mississippi Rules of Evidence. See <u>M.R.E. 902(4)</u> and <u>(1)</u>. While the rules are not controlling, they provide additional support for our proposition.

The only question left is whether the sentencing order was properly [**18] certified.

Monroe, 515 So.2d at 868.

This Court has held that in habitual offender sentencing trials where the actual judgment of conviction is not introduced, the issue may only be proven by documents accorded the equivalent evidentiary weight by statute. DeBussi v. State, 453 So.2d 1030 (Miss. 1984); Pace v. State, 407 So.2d 530 (Miss. 1981).

With the adoption of the Mississippi Rules of Evidence on January 1, 1986, the issue of what documents are afforded such evidentiary weight are no longer controlled by statute but rather by Article IX, Authentication and Identification, of the rules. M.R.E. 901(a) states the general rule that the requirement of authentication as a prerequisite to admissibility may be established by evidence sufficient to support a finding that the matter in question is what the proponent claims it is. In this case, the State offered no proof whatsoever which would support such a finding. Rather the State sought to introduce the exhibits as self-authenticating documents under M.R.E. 902, which provides that certain documents may be admitted without extrinsic evidence of authenticity. However, the exhibits in question [**19] fail to meet the requirements of any of the provisions of M.R.E. 902.

Paragraph (1) of <u>M.R.E. 902</u> makes domestic public documents under seal <u>self-authenticating</u>. Paragraph (2) of <u>M.R.E. 902</u> makes domestic public documents not under seal <u>self-authenticating</u> if another public officer certifies under seal that the signer has the official capacity claimed and that the signature is genuine. Paragraph (4) of <u>M.R.E. 902</u> makes certified copies of public record <u>self-authenticating</u> if the certification complies with Paragraphs (1), (2) or (3), any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

The certification must not only certify as to the authenticity of the signature but also as to the official capacity of the signor. HN11[1] Exhibits that are not properly authenticated cannot be accepted as evidence. In the case sub judice the State failed to produce evidence of a second felony conviction. Exhibit S-4, documents from the Shelby County, Tennessee Bureau of Investigation, were not properly certified, as the copies were only notarized. Exhibit S-5, the Crawford letter was not a public document. Exhibit S-6, the file copies from the Reception and Medical [**20]

Center of the Florida Department of Corrections, were copies of copies; they were not certified copies of a public record. Therefore, the trial court improperly sentenced Cox as a habitual offender; this Court reverses the sentencing as an habitual offender.

In reversing the trial court's sentence, this Court is keenly aware of the burden placed on the State to obtain proof of prior convictions from sources that insure authenticity under the rules. This burden is not unreasonable, considering that the State seeks to enhance the sentence of a defendant; authentic documentation provides reliable proof that the defendant merits an enhanced sentence.

The question now becomes "whether the State has the right to a second chance at proving the [habitual offender] status of [Cox] as opposed to [Cox's] right not to be twice placed in jeopardy." DeBussi, 453 So.2d at 1032. Miss. Const. art. 3 § 22 [*768] (1890). Dycus v. State, 440 So.2d 246, 258 (Miss. 1983) (applying double jeopardy to capital sentencing proceeding).

In DeBussi, this Court held that <u>HN12[*]</u> re-prosecution of an habitual offender was barred where there was not sufficient evidence to support a conviction apart [**21] from the evidence erroneously admitted by the trial judge. Although the State "could possibly cure" this error "if it were given a second opportunity," "the essence of the double jeopardy prohibition is to limit the State to one fair opportunity to offer what proof it could assemble." DeBussi, 453 So.2d at 1034.

The habitual offender portion of this sentence must be vacated for reason of the insufficiency of the evidence to support the finding apart from the evidence erroneously admitted by the trial court. Only one valid conviction was admitted. The statute, <u>Miss. Code Ann. § 99-19-83</u> (Supp. 1990), requires sufficiently <u>authenticated</u> proof of two convictions. Failing in its attempt on the first trial, Miss. Const. art. 3, § 22 bars the State from perfecting its evidence through successive attempts. <u>Tibbs v. Florida</u>, 457 U.S. 31, 41, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982).

Resentencing for the affirmed conviction of arson of a dwelling house must be upheld. <u>Miss. Code Ann. § 97-17-1</u> provides for a sentence of not less than two (2), nor more than twenty (20) years in the Department of Corrections. This case is remanded for [**22] resentencing under this statute.

AFFIRMED AS TO THE CONVICTION FOR ARSON; REVERSED AND RENDERED AS TO THE FINDING

THAT APPELLANT WAS AN HABITUAL OFFENDER AND REMANDED FOR PROPER RE-SENTENCING UNDER <u>MISS. CODE ANN. § 97-17-1</u> (1972).

End of Document

Taggart v. State

Supreme Court of Mississippi June 7, 2007, Decided NO. 2006-KA-00704-SCT

Reporter

957 So. 2d 981 *; 2007 Miss. LEXIS 330 **

LEON D. TAGGART v. STATE OF MISSISSIPPI

Prior History: [**1] COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 04/12/2006. TRIAL JUDGE: HON, ROBERT P. CHAMBERLIN.

Disposition: AFFIRMED.

Core Terms

sentence, trial judge, rape, documents, trial court, kidnapping, sentencing phase, armed robbery, cases, aggravation, burglary, sentencing hearing, forcibly, introducing evidence, sentencing jury, convicted, hearsay, records, sentencing judge, life sentence, admissibility, indictment, rebuttal, knife, jury instructions, defense counsel, mitigation, introduce, proceeded, counts

Case Summary

Procedural Posture

Defendant appealed a judgment of the Desoto County Circuit Court (Mississippi) convicting him of rape in violation of <u>Miss. Code Ann. § 97-3-65(4)(a)</u> (2006), kidnapping in violation of <u>Miss. Code Ann. § 97-3-53</u> (2006), and armed robbery in violation of <u>Miss. Code Ann. § 97-3-79</u> (2006), and sentencing him to three sentences of life in prison, to be served consecutively.

Overview

Defendant was convicted for raping the victim at knife point, driving her to an ATM machine, and taking the cash the victim withdrew from her bank account. On appeal, the court held that the trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial because

the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. The trial court did not abuse its discretion by admitting into evidence during sentencing defendant's prior Texas conviction of second-degree robbery because it was relevant for the sentencing jury, consistent with Miss. Unif. Cir. & Cty. R. 10.04(B)(1), to consider. In addition, the documentation of the prior conviction and sentence was properly certified and authenticated according to the Acts of Congress.

Outcome

Defendant's convictions and sentences were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Criminal Law & Procedure > Trials > Verdicts > General Overview

HN1[Standards of Review, Substantial Evidence

The appropriate inquiry on appeal in considering the trial court's denial of a judgment notwithstanding the verdict motion is whether the evidence shows beyond a reasonable doubt that the defendant committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction. An appellate court must, with respect to

each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with the guilt of the accused must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are resolved by the jury. The appellate court may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Criminal Law & Procedure > Trials > Verdicts > General Overview

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

<u>HN2</u>[基] Trials, Verdicts

An appellate court's standard of review for the trial court's denial of directed verdicts and peremptory instructions is the same as that for the trial court's denial of a judgment notwithstanding the verdict. All evidence introduced by the State is to be accepted as true, together with any reasonable inferences that can be drawn from that evidence.

Criminal Law & Procedure > Trials > Verdicts > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN3[♣] Trials, Verdicts

That as a matter of law the motion for judgment notwithstanding the verdict must be overruled and denied in no way affects and little informs the trial judge regarding his disposition of the motion for a new trial.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN4[基] Appeals, Standards of Review

A motion for a new trial falls within a lower standard of review than does that for a judgment notwithstanding the verdict. A motion for a new trial simply challenges the weight of the evidence. The Supreme Court of Mississippi has explained that it will reverse the trial court's denial of a motion for a new trial only if, by doing so, the court abused its discretion. The court will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. The court has also explained that factual disputes are properly resolved by a jury and do not mandate a new trial.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN5[] Abuse of Discretion, Evidence

As with all evidentiary issues, an appellate court's standard for reviewing a trial judge's admission or exclusion of evidence is one of abuse of discretion. A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the court will not reverse this ruling.

Evidence > ... > Exceptions > Public Records > General Overview

<u>HN6</u>[基] Exceptions, Public Records

See Miss. R. Evid. 803(8).

Evidence > Authentication > Self-Authentication

HN7 Authentication, Self-Authentication

See Miss. R. Evid. 902.

Criminal Law & Procedure > ... > Sexual Assault > Rape > Penalties

Criminal Law & Procedure > ... > Crimes Against Persons > Kidnapping > Penalties

Criminal Law & Procedure > ... > Robbery > Armed Robbery > Penalties

HN8[] Rape, Penalties

Other than the death penalty statutory sentencing scheme in capital murder cases, there are three instances in which a jury in Mississippi may impose the sentence upon finding a defendant guilty of a felony criminal offense. Those instances are where the jury has found the defendant guilty of kidnapping (<u>Miss. Code Ann. § 97-3-53</u> (Rev. 2006)), rape (<u>Miss. Code Ann. § 97-3-65(4)(a)</u> (Rev. 2006)), and/or armed robbery (<u>Miss. Code Ann. § 97-3-79</u> (Rev. 2006)).

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

<u>HN9</u>[♣] Capital Punishment, Bifurcated Trials

See Miss. Unif. Cir. & Cty. R. 10.04.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > General Overview

<u>HN10</u>[♣] Capital Punishment, Bifurcated Trials

Pursuant to Miss. Unif. Cir. & Cty. R. 10.04(B)(1), the State may introduce for the benefit of the sentencing jury evidence of aggravation of the offense of which the defendant has been adjudged guilty.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Evidence

Criminal Law &
Procedure > Sentencing > Appeals > General
Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN11[基] Imposition of Sentence, Evidence

A trial judge, sitting without a jury, has broad discretion in the things he is able to consider. He may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come. The imposition of a sentence is within the discretion of the trial court, and an appellate court will not review the sentence, if it is within the limits prescribed by statute. In imposing sentence, the trial court may take into account larger societal concerns, as long as the sentence is particularized to the defendant.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Evidence

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

<u>HN12</u>[基] Imposition of Sentence, Evidence

If, as stated in the Summerall case, admission of evidence of other crimes was proper under Miss. Unif. Cir. & Cty. R. 10.04(C)(2) before the sentencing judge, it necessarily follows that admission of evidence of other crimes (including convictions) would likewise be proper under Rule 10.04(B)(1) before the sentencing jury. After all, the sentencing jury should have available to it the same information as the sentencing judge, in order to arrive at the appropriate punishment.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN13 [Sentencing, Capital Punishment

Pursuant to <u>Miss. Code Ann. § 1-3-4</u> (Rev. 2005), the term "capital case" or "capital offense," when used in our statutes, denotes a criminal offense which is "punishable by death or imprisonment for life in the state penitentiary." On the other hand, the term "capital murder" denotes a criminal offense which is punishable by death or life imprisonment.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Evidence

HN14[♣] Imposition of Sentence, Evidence

Miss. Unif. Cir. & Cty. R. 10.04(B) sets out the order of proof. First, the prosecution may introduce evidence of aggravation of the offense for which the defendant has been convicted. Next, the defendant has the opportunity to then introduce any evidence of extenuation or mitigation. Finally, if the prosecution so chooses, it may introduce evidence in rebuttal of the evidence of the defendant.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Factors

HN15 Marie Imposition of Sentence, Factors

There are at least four generally recognized factors that any sentencing judge should consider in the exercise of discretionary sentencing of any defendant who stands before the court for imposition of sentence: (1) rehabilitation; (2) retribution; (3) separation from society; and, (4) deterrence, both general and specific. The judge, in exercising individualized sentencing, and considering all information that the judge may have on the particular defendant, should consider what sentence will hopefully have a rehabilitative effect on the defendant. The judge, in exercising individualized sentencing, should consider what sentence will hopefully have a retributive effect on the defendant - in other words, recognizing that society's law-abiding citizens have a right to expect from their judges that once a defendant is convicted of a crime, that defendant

will "pay" for that crime, what sentence will appropriately punish that defendant for his/her crime. The judge, in exercising individualized sentencing, should consider whether the nature of the crime, the defendant's background, including the defendant's prior criminal history, and other relevant information requires that the defendant be punished by way of separation from society through a penitentiary sentence.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Factors

HN16 [Imposition of Sentence, Factors

A judge, in exercising individualized sentencing, should consider what sentence will hopefully have both a general and specific deterrent effect - in other words, a sentence that will generally deter society as a whole from engaging in criminal activity, and will specifically deter the particular defendant from engaging in future criminal activity.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Factors

HN17[] Imposition of Sentence, Factors

A sentencing jury should be able to consider the same factors as the sentencing judge, and the jury should be allowed to receive that information via appropriately admitted evidence in order to aid the jury in fulfilling its statutorily mandated sentencing duties.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

HN18 Capital Punishment, Aggravating Circumstances

Miss. Code Ann. § 99-19-101(1) provides that at the sentencing hearing evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. The statute does not limit the evidence that can be presented at the sentencing phase to evidence relevant to the aggravating circumstances.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Evidence

<u>HN19</u> Capital Punishment, Aggravating Circumstances

In Hodges, the Supreme Court of Mississippi unequivocally stated that during the sentencing phase of a capital murder trial, the State is not limited to presenting relevant evidence which went only to rebuttal of the defendant's mitigating evidence. Instead, the court expressly stated that any evidence which the trial court deemed to be relevant to sentence was admissible at the sentencing phase. Even though the sentencing hearings in death penalty cases are guided by statute, as opposed to uniform rule, the court can logically deduce that if, in those cases where the sentencing jury is considering whether to impose the death penalty, the judge has discretion to allow the sentencing jury to consider any evidence that the court deems relevant to sentence, then certainly the trial judge should not be hamstrung in non-death penalty cases concerning the admissibility of relevant evidence - such as a prior conviction - which would appropriately guide the sentencing jury in considering whether to impose life imprisonment upon a defendant convicted kidnapping, rape, and/or armed robbery.

Counsel: FOR APPELLANT: DAVID CLAY VANDERBURG.

FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: DESHUN TERRELL MARTIN.

Judges: CARLSON, JUSTICE. SMITH, C.J., WALLER, P.J., EASLEY, DICKINSON AND RANDOLPH, JJ., CONCUR. GRAVES, J., CONCURS IN RESULT ONLY. DIAZ, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. LAMAR, J., NOT PARTICIPATING.

Opinion by: CARLSON

Opinion

NATURE OF THE CASE: CRIMINAL - FELONY

[*983] EN BANC.

CARLSON, JUSTICE, FOR THE COURT:

P1. Leon D. Taggart went to trial in DeSoto County Circuit Court on a multi-count indictment charging him with house burglary, rape, kidnapping and armed robbery. The jury found Taggart not guilty of house burglary; however, the jury found Taggart guilty of rape, kidnapping and armed robbery. At the conclusion of the separate sentencing phase of the trial, the same jury returned sentences of life imprisonment as to each of the three capital offenses, whereupon the trial judge sentenced Taggart to serve these life sentences consecutively. After a denial of post-trial motions, Taggart appealed to us. Finding no reversible error, we affirm.

FACTS AND PROCEEDINGS [**2] IN THE TRIAL COURT

P2. We give here only a brief recitation of the facts for a full understanding of this case; however, during the subsequent discussion of the issues before us, more facts will be revealed. Suffice it to state here that on September 6, 2005, a man known to the victim as "Dale Baxter" appeared in the victim's bedroom shortly after 6:00 a.m. The victim, who lived in Southaven near the intersection of Nail Road and U.S. Highway 51, would later learn that "Dale Baxter" was an alias sometimes [*984] used by Leon D. Taggart; therefore, we will refer to the defendant by his true name. According to the victim's testimony at trial, Taggart bound the victim with duct tape and forcibly raped her at knife-point, with the victim's niece sleeping in a nearby bedroom. Taggart used the knife to cut off the victim's pajamas and in the process of the initial struggle, the victim was cut. Although she initially resisted Taggart's acts, the victim ceased her resistance after Taggart's threats of violence upon her and her niece. At the time of these crimes, the victim's husband was in Louisiana performing subcontracting work in the wake of Hurricane Katrina, which had occurred only eight days [**3] earlier. At all relevant times during the victim's ordeal, Taggart had the knife in his hand. After Taggart raped the victim, he told her that they were going to Winona, "where the woods get thick," so the two of them left in the victim's car against her will, with her driving. At Taggart's instructions, the victim drove to an ATM at a Bancorp South branch on Church Road and withdrew \$ 55, leaving a \$.32 balance in her account. The ATM receipt indicated that the money was withdrawn at 6:58 a.m. on September 6, 2005. The victim gave Taggart the \$ 55 cash because he had a knife "stuck in my side."

P3. From Church Road, Taggart and the victim then proceeded south on Interstate 55. As they approached the Hernando exit, Taggart inquired of the victim if she was familiar with Hernando, and she lied by responding "no." Following Taggart's directions, the victim exited at Hernando and drove to McDonald's, which was located on Commerce Street near Interstate 55. The victim had her seatbelt off and proceeded to drive toward the drivethrough window at McDonald's, but then she "gunned it, opened the door and tucked and rolled and came up screaming," causing the car to crash into a nearby dumpster. [**4] Taggart then quickly exited the vehicle and headed east toward Interstate 55. Approximately minutes later, two Hernando policemen apprehended Taggart while he was walking down Commerce Street about a quarter of a mile from McDonald's near the northbound ramp to Interstate 55.

P4. In due course, the DeSoto County grand jury handed down a four-count indictment charging Taggart with burglary of a dwelling (Count 1), forcible rape (Count 2), kidnapping (Count 3), and armed robbery (Count 4). At trial, the State called six witnesses in its case-in-chief: The victim; Sergeant Donna Barton, a Southaven police officer; Detective Edward James, the senior crime scene investigator, who had received the Automated Fingerprint training regarding Identification System (AFIS), including latent prints; Detective Jeff Scruggs, also a Southaven police officer; Detective Russell Perry, a Hernando policeman; and, Dr. Roy W. "Bo" Scales, an expert in DNA and forensic analysis from Brandon. After the State rested, Taggart, through counsel, moved for a directed verdict of acquittal on all four counts, and the trial court denied the

motion. 1

P5. In the defendant's case-in-chief, two witnesses were called: Jerry Reed, the victim's neighbor who lived across the street; and Taggart. Contrary to the victim's testimony that she was forcibly raped at knife-point while bound with duct tape, [*985] Taggart testified that he and the victim engaged in consensual sex initiated by the victim, and that the victim "wanted to make it special, and she was into, like, bondage, you know." Taggart also claimed that he never completed the sex act that day because the victim accidentally cut herself with the knife while doing "this bondage thing." Additionally, Taggart stated that he and the victim had previously had consensual sex on several occasions because the victim was having marital problems with her husband. Taggart also testified that the victim's motive for fabricating [**6] the rape, kidnapping and armed robbery, all of which he denied, was that the victim "was upset because she wanted her husband [] to come back, and he was waffling on her because he didn't really want to come back to her."

P6. After the State's brief rebuttal, the trial judge's reading of the instructions to the jury, and closing arguments from counsel, the jury retired to deliberate and in due course returned verdicts of guilty as to rape, kidnapping and armed robbery; however, the jury found Taggart not guilty of the crime of burglary of a dwelling. The trial judge then proceeded to the sentencing phase of the trial before the same jury. After the presentation of additional evidence, the trial judge's reading of additional instructions to the jury, and closing arguments from counsel, the jury once again retired to deliberate, whereupon the jury returned sentences of life imprisonment on Counts 2, 3, and 4 (rape, kidnapping and armed robbery). Consistent with the action of the jury, the trial judge imposed three life sentences upon Taggart, ordering these sentences to run consecutively.

¹The trial court also granted the State's *ore tenus* motion to [**5] amend Count 1 of the indictment, which charged Taggart with the crime of burglary of a dwelling . . . "with the intent to commit some crime therein." The amendment set out that Taggart was charged with the crime of burglary of a dwelling . . "with the intent to commit the crime of rape." As already noted, Taggart was in due course acquitted as to Count 1 of the indictment.

² The jury verdict of not guilty as to Count 1, house burglary, is not inconsistent with the verdicts of guilty on the other counts, since there was sufficient testimony before the jury that Taggart, who lived in a camper behind the victim's house, had access to the victim's home with the victim's consent.

Taggart thereafter filed a motion for a new trial and a separate motion for a judgment notwithstanding [**7] the verdict. After the trial judge's denial of these post-trial motions, Taggart perfected this appeal.

DISCUSSION

P7. Taggart, through counsel, assigns two errors for us to consider: (1) Whether the trial court erred in denying his motion for a directed verdict at the close of the State's case-in-chief, as well as his proposed jury instruction D-1, which was a peremptory instruction directing the jury to find Taggart not guilty on all four counts of the indictment; and (2) whether the trial court erred in allowing Taggart's prior Texas conviction into evidence during the sentencing phase of the trial. We restate these issues for clarity in discussion.

I. WHETHER THE TRIAL COURT ERRED IN DENYING TAGGART'S POST TRIAL MOTIONS

A. Motion for J.N.O.V.

P8. We are mindful of the fact that in his motion for judgment notwithstanding the verdict (J.N.O.V.), Taggart not only attacked the legal sufficiency [**8] of the overall evidence adduced at trial, he also asserted trial court error in denying his motion for a directed verdict made at the close of the State's case-in-chief, and in denying his proposed jury instruction D-1, which stated "[t]he Court instructs the jury to find the Defendant not quilty on all counts." Our cases are legion on this issue. HN1[4] The appropriate inquiry on appeal in considering the trial court's denial of a J.N.O.V. motion is "whether the evidence shows beyond a reasonable doubt that [the [*986] defendant] committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." Bush v. State, 895 So. 2d 836, 843 (Miss. 2005) (quoting Carr v. State, 208 So. 2d 886, 889 (Miss. 1968)). Stated differently,

[w]e must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with the guilt [of the accused] must be accepted as true. The prosecution must be given the benefit of [**9] all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence

are resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. <u>Wetz v. State. 503 So. 2d 803, 808 (Miss. 1987)</u> (citations omitted).

Gleeton v. State, 716 So. 2d 1083, 1087 (Miss. 1998) (quoting Franklin v. State, 676 So. 2d 287, 288 (Miss. 1996)). HN2 Our standard of review for the trial court's denial of directed verdicts and peremptory instructions is the same as that for the trial court's denial of a J.N.O.V. "[A]II evidence introduced by the State is to be accepted as true, together with any reasonable inferences that can be drawn from that evidence." Wall v. State, 718 So. 2d 1107, 1111 (Miss. 1998) (quoting Brown v. State, 556 So. 2d 338, 340 (Miss. 1990)).

P9. According to the appropriately given jury instructions, (1) in order to find Taggart guilty of rape, the jury had to find that on or about September 6, 2005, Taggart had forcible sexual intercourse ("penis of the [**10] male is inserted into the vagina of the female") with the victim; (2) in order to find Taggart guilty of kidnapping, the jury had to find that on or about September 6, 2005, Taggart forcibly seized and confined the victim "with intent to cause her to be secretly confined, or with intent to cause her to be imprisoned against her will;" and (3) in order to find Taggart guilty of armed robbery (robbery using a deadly weapon), the jury had to find that on or about September 6, 2005, Taggart feloniously took \$ 55 cash from the presence or person of the victim, being the personal property of the victim, against her will by putting the victim in fear of immediate injury by the exhibition of a deadly weapon (the knife), and that the victim parted possession with her cash money only because of being in fear of immediate injury to her person being inflicted by Taggart. In each "element" instruction, the jury also was informed that if the State failed to prove any one or more of the elements of the offense charged, beyond a reasonable doubt, the jury must find Taggart not guilty of that particular criminal offense.

P10. With our appropriate standard of review in mind as we consider the trial judge's [**11] denial of Taggart's motion for a directed verdict, peremptory instruction and J.N.O.V., we turn to the record before us in today's case. In reviewing the evidence, as well as the reasonable inferences which might be drawn from the evidence, in the light most favorable to the prosecution, we note here certain facts: Taggart bound the victim and

TEXAS CONVICTION.

P14. After jury deliberations in the first phase of the trial, the jury found Taggart not guilty of house burglary, but guilty of forcible rape, kidnapping, and armed robbery. After the conclusion of the guilt/innocence phase, the trial judge then proceeded to the sentencing phase before the same jury. As is customary, the prosecutor requested the trial judge to permit the State to incorporate all evidence adduced in the first phase of the trial into the record during the sentencing phase, so as to permit the jury to consider this prior evidence in arriving at the appropriate punishment. Without objection from defense counsel, the trial judge granted the State's request, meaning that at the sentencing phase, the jury had before it, inter alia, the detailed testimony of the victim as to the actions of the defendant.

P15. However, over Taggart's objection, the trial judge also allowed the State to introduce into evidence Taggart's 1986 Texas conviction and sentence, [**16] revealing that on May 19, 1986, he was convicted and sentenced for second degree robbery in the 252nd District Court of Jefferson County, Texas. At the time this documentary evidence was offered by the State, the record reveals that the following occurred:

BY THE COURT: Any objection, [defense counsel]? BY [DEFENSE COUNSEL]: Yes, sir, May we approach?

BY THE COURT: Yes, sir.

(COUNSEL APPROACHED THE BENCH FOR A CONFERENCE; SAME NOT REPORTED.)

BY THE COURT: First, for the jury, you'll notice that we were shuffling some papers and up here talking at the bench. The parties, [prosecutor] and [defense counsel], have agreed that the only thing to be submitted is the actual judgment - the actual conviction of Mr. Taggart in the prior case.

In regard to that, [defense counsel], other than that, any further objection?

BY [DEFENSE COUNSEL]: Your Honor, just for the record, we would object to the documents as being hearsay.

BY THE COURT: Okay. [Prosecutor], any response?

BY [PROSECUTOR]: Your Honor, they are certified under the seal of the Clerk of the Court of Jefferson County, Texas, and under our rules, they meet all the applicable burdens.

BY THE COURT: In conformity with the agreement made at the bench [**17] regarding [*989] the

withdrawal of the other documents, the Court will overrule the objection as to this prior conviction, and it will be admitted for the sentencing phase of this hearing.

P16. Other than the incorporation of the evidence from the guilt/innocence phase into the record for the sentencing phase, and documentary evidence of the Texas robbery conviction, the only additional evidence offered by the State during the sentencing phase was brief testimony from the victim as to how these crimes had affected her life and a plea from the victim to the jury to "[j]ust please send him away as long as you possibly can." The victim was not cross-examined by defense counsel, nor did Taggart offer any additional evidence. After the trial judge read the sentencing instructions to the jury, and the jury heard the closing arguments of the attorneys, the jury retired to deliberate, returning life sentences as to forcible rape, kidnapping and armed robbery. The trial judge thereafter entered a sentencing order, consistent with the jury verdict, sentencing Taggart to three life sentences, and the trial judge also ordered these sentences to be served consecutively.

P17. <u>HN5[*]</u> As with all evidentiary issues, [**18] our standard for reviewing a trial judge's admission or exclusion of evidence is one of abuse of discretion. <u>Shaw v. State</u>, 915 So. 2d 442, 445 (Miss. 2005). "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." <u>Id. at 445</u> (quoting <u>Jefferson v. State</u>, 818 So. 2d 1099, 1104 (Miss. 2002)).

P18. Documentary proof of Taggart's prior Texas conviction consists of Exhibit 39, a three-page document certified according to the Acts of Congress. Page one of this document reveals that Lolita Ramos, the Clerk of the District Courts for Jefferson County, Texas, certified that the attached documents were "a true and correct copy" on file in cause number 46648 styled "The State of Texas vs. Leon Dwayne Taggart." Ramos signed this certificate under the seal of the District Court, Judge Layne Walker of the 252nd District Court of Jefferson County, Texas, certified that Ramos was the Clerk of the Court at the time of her attestation. Ramos also certified that Judge Walker, at the time of making his certification, was the judge of the 252nd [**19] District Court of Jefferson County, Texas. The attached documentation revealed that on May 19, 1986, Taggart offered a guilty plea to the charge of second

forcibly raped her, using the exhibition of the knife and threat of bodily harm to her and her niece if she resisted; DNA testing from the rape kit showed the presence of semen, but no sperm, in the victim's vagina, but Dr. Scales testified that the absence of sperm [*987] in the semen was "consistent with the male donor not reaching ejaculation" (the victim testified that she did not think Taggart had ejaculated inside of her "[b]ecause it was only semi-firm and just because he didn't look like he had had an orgasm."); by constantly exhibiting the knife Taggart forced the victim to get in her car with him to drive to Winona, "where the woods get thick;" the two of them left in the victim's car against her will, with her driving; and the victim made an ATM withdrawal of \$ 55 and gave Taggart the cash because he had a knife "stuck in my side." Thus, [**12] based on the status of the record in this case, and considering the applicable law, we find that the trial judge committed no error in denying Taggart's motion for J.N.O.V., again acknowledging that contained within Taggart's J.N.O.V. motion were assertions that the trial court erred in denying his motion for a directed verdict and his submitted peremptory "not guilty" instruction.

B. Motion for a New Trial.

P11. As we recently stated in <u>Jones v. State</u>, <u>918 So.</u> 2d 1220, 1235 (Miss. 2005):

HN3 [1] "That as a matter of law the motion for judgment notwithstanding the verdict must be overruled and denied in no way affects and little informs the trial judge regarding his disposition of the motion for a new trial." Jesco, [Inc. v. Whitehead], 451 So. 2d [706] at 714 [(Miss. 1984)](Robertson, J., specially concurring). As with a j.n.o.v. motion, our law is well-settled concerning our review of the trial court's denial of a motion for a new trial:

HN4 [*] A motion for a new trial, however, falls within a lower standard of review than does that for a judgment notwithstanding the verdict. Id. at 127. A motion for a new trial simply challenges the weight of the evidence. Id. This Court has explained that it will [**13] reverse the trial court's denial of a motion for a new trial only if, by doing so, the court abused its discretion. Id. (quoting Gleeton v. State, 716 So. 2d at 1088). "We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction

an unconscionable injustice." *Id.* (quoting *Groseclose v. State, 440 So. 2d 297, 300 (Miss. 1983)*). This Court has also explained that factual disputes are properly resolved by a jury and do not mandate a new trial. *McNeal v. State, 617 So. 2d 999, 1009 (Miss. 1993)*. *Holloway v. State, 809 So. 2d 598, 605-06 (PP21-22) (Miss. 2000)*.

Ginn v. State, 860 So. 2d 675, 685 (Miss. 2003). See also Bush v. State, 895 So. 2d 836, 844 (Miss. 2005), and URCCC 10.05.

Id. at 1235.

P12. As horrendous as the acts inflicted upon the victim by Taggart are, this case is no different than the numerous jury trials conducted daily in this state and in each state of this nation - this case, like all others, contains conflicting testimony. This is unquestionably a case of "she said - he said." "She" said" she was forcibly raped, kidnapped and robbed by "him" at knife-point. "He [**14] said" he was engaging in consensual rough sex with "her" and that none of these acts of rape, kidnapping and armed robbery occurred, but instead they were fabrications by "her" because of "her" unhappy married life. The cold hard facts are that this was a "classic jury case." The jury had before it this conflicting testimony of the witnesses, as well as the exhibits and the jury instructions, and it was the responsibility of the jury to [*988] make findings of fact and then apply the law as given by the trial judge to the facts to reach a proper verdict as to each of the four counts of the indictment. With this in mind, we are convinced that the guilty verdicts of the jury concerning the counts charging Taggart with rape, kidnapping and armed robbery are beyond the authority of this Court to disturb. Stated differently, we are in no way convinced that the jury verdicts were so contrary to the overwhelming weight of the evidence that to allow these verdicts to stand would be to sanction an unconscionable injustice. Therefore, the trial court did not commit error in denying Taggart's motion for a new trial.

P13. In sum, we find that the trial court did not err in denying Taggart's motion for [**15] J.N.O.V. and his separate motion for a new trial. Therefore, this first issue is without merit.

II. WHETHER THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE DURING THE SENTENCING PHASE THE DEFENDANT'S PRIOR

degree robbery and, upon acceptance of the guilty plea, the court sentenced Taggart to serve a term of fifteen years imprisonment in the custody of the Texas Department of Corrections.

P19. To support his argument that this certified documentation concerning his Texas conviction was hearsay, Taggart cites but one case - Ficklin v. State. 758 So. 2d 457 (Miss. Ct. App. 2000). Taggart simply states that in Ficklin, the trial court "allowed a certified copy of a computer-generated record from the Mississippi Department of Corrections into evidence. The Court [of Appeals] held that certified computer printouts of Defendant's inmate files from the Mississippi Department of Corrections offer[ed] to show that he was an habitual offender, were hearsay evidence."

P20. In Ficklin, the defendant was found guilty of aggravated assault, and the trial judge sentenced the defendant to life imprisonment without parole as a habitual offender pursuant to Miss. Code Ann. § 99-19-83 (Rev. 2000). During the sentencing hearing before the trial judge, the [**20] defendant objected to the State's offering into evidence the computer-generated, records from the Mississippi 1*9901 certified Department of Corrections in an effort to prove the defendant was a habitual offender. Over the defendant's objections that the records were hearsay and that the records were incapable of being certified as selfauthenticating documents, the trial judge allowed these documents into evidence concerning his habitualoffender status. In a thorough discussion on this issue, the Court of Appeals found that, while the documents were hearsay, they were admissible pursuant to Miss. R. Evid. 803(8). Ficklin, 758 So. 2d at 461-62. In reaching this conclusion on an "issue of first impression in this State," the Court of Appeals cited United States v. Ryan, 969 F.2d 238, 240 (7th Cir. 1992); Hughes v. United States, 953 F.2d 531, 540 (9th Cir. 1992); and United States v. Young Brothers, Inc. 728 F.2d 682. 693-94 (5th Cir. 1984), as well as the federal counterpart to Mississippi's Rule 803(8). Id. at 462. In citing and discussing Miss. R. Evid. 902(4), the Court of Appeals concluded that these certified, computergenerated documents were properly allowed by the trial judge. Id.

P21. [**21] <u>Miss. R. Evid. 803</u> sets out various hearsay exceptions, where the availability of the declarant is immaterial:

HN6 Public Records and Reports. Records, reports, statements, or data compilations, in any

form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Miss. R. Evid. 803(8), Miss. R. Evid. 902 provides that:

HN7[*] "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . (4) . . . [a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian [**22] or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule ³ or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority." ⁴

P22. In <u>Doolie v. State</u>, 856 So. 2d 669, 672-73 (Miss. Ct. App. 2003), the Court of Appeals found that the trial court did not err in a felony DUI trial in admitting the Mississippi Department of Public Safety's printout of the defendant's driving record pursuant to Miss. R. Evid. 803(8).

P23. This Court considered the applicability of <u>Miss. R. Evid. 902(4)</u> in <u>Cox v. State, 586 So. 2d 761 (Miss. 1991)</u>. In **Cox**, the defendant was convicted of arson and sentenced to life without parole as a habitual offender. In a separate sentencing hearing before the trial judge, the [**23] State offered documentation concerning a prior Mississippi conviction and a prior Florida [*991] conviction to prove the defendant's

³ <u>Paragraphs (1)</u>, (2), and (3) of <u>Rule 902</u> relate to (1) domestic public documents under seal; (2) domestic public documents not under seal; and (3) foreign public documents.

⁴While Taggart has made no $\underline{Rule\ 902(4)}$ argument here, we briefly discuss the rule since we are in the end adopting the Court of Appeals' reasoning in $\underline{Ficklin}$, which involved both $\underline{Rule\ 803(8)}$ and $\underline{Rule\ 902(4)}$ issues.

habitual offender status. The defendant did not contest the admissibility of the documentation concerning the Mississippi armed robbery conviction; but, the defendant did contest the admissibility of the documentation concerning the Florida burglary conviction. The documentation which the State offered to prove this second conviction consisted of (1) a notarized statement by the Bureau of Investigation of the Memphis, Tennessee Police Department detailing the defendant's arrest and conviction record from the Federal Bureau of Investigation; (2) a notarized statement from a of the Florida correctional records supervisor Department of Corrections asserting that the defendant had been sentenced for burglary and detained by the FDOC for less than a year when he escaped; and (3) a signed cover letter from the Superintendent of the Florida Department of Corrections with enclosed uncertified documents, including copies of the defendant's commitment papers, judgment of conviction, fingerprints and photographs, with some of the documents containing the seal of the clerk [**24] of the court, but with none of the documents being certified according to the Acts of Congress. Id. at 765. This Court concluded that this documentation was not sufficient to prove this second conviction from Florida; therefore, while the arson conviction was affirmed, on the other hand, the habitual offender sentence was vacated and the case was remanded for resentencing under the appropriate arson statute. Id. at 768.

P24. In Taggart's case, the documentation of his 1986 Texas conviction and sentence for second degree robbery was properly certified and authenticated according to the Acts of Congress; therefore, our case today is distinguishable from Cox. Returning to the Court of Appeals' decision in *Ficklin*, we agree with the Court of Appeals' reasoning on the Rule 803(8) issue, and adopt its reasoning in today's case. Ficklin. 758 So. 2d at 461-62. Thus, as to Taggart's hearsay objection to the certified documents concerning the Texas conviction, the trial judge properly overruled Taggart's objection. While the documentation was no doubt hearsay, this evidence was properly admitted by the trial judge pursuant to the hearsay exception under Miss. R. Evid. 803(8).

P25. Practically [**25] all of our cases concerning the use of prior convictions at sentencing hearings address this critical issue in the context of sentencing hearings before the trial judge, sitting without a jury. However, in today's case, the sentencing phase of Taggart's trial was conducted before the same jury that already had found Taggart guilty of the capital offenses of rape,

kidnapping, and armed robbery. We thus take this opportunity to address this issue in the context of sentencing hearings conducted before the jury in those instances where the statute provides for the sentence to be considered by the jury.

P26. HN8[*] Other than the death penalty statutory sentencing scheme in capital murder cases, there are three instances in which a jury in Mississippi may impose the sentence upon finding a defendant guilty of a felony criminal offense. Those instances are where the jury has found the defendant guilty of kidnapping (Miss. Code Ann. § 97-3-53 (Rev. 2006)), rape (Miss. Code Ann. § 97-3-65(4)(a) (Rev. 2006)), and/or armed robbery (Miss. Code Ann. § 97-3-79 (Rev. 2006)). Taggart was indicted for all three of these capital offenses. Pursuant to each of these three statutes, the jury may impose a life [**26] sentence upon the defendant; however, if the jury is unable to agree on a life sentence, it then falls to the responsibility of the trial judge, sitting without a jury, to [*992] impose the sentence within the statutory parameters. ⁵ According to the record in today's case, the trial judge appropriately bifurcated this trial so that the jury initially would receive evidence only on the issue of guilt/innocence. Thus, during the first phase of the trial, the jury was not informed of Taggart's prior Texas conviction.

P27. While Taggart's Texas robbery conviction was inadmissible during the guilt/innocence phase of the trial; on the other hand, the introduction of the prior Texas robbery conviction during the sentencing phase was not error and indeed [**27] was quite appropriate.

P28. URCCC 10.04 sets out the procedure for bifurcated trials in criminal cases, and we quote this rule here, verbatim:

HN9 Rule 10.04 BIFURCATED TRIALS

A. In any case where the state seeks to impose the death penalty, the trial shall be conducted in accordance with §§ 99-19-101 and 99-19-103, of the Mississippi Code of 1972 as amended and

⁵ For kidnapping, the sentencing judge has the authority to impose a penitentiary sentence of not less than one year, nor more than thirty years; for rape under <u>section 97-3-65(4)(a)</u>, the sentencing judge has the authority to impose a penitentiary sentence "for any term as the court, in its discretion, may determine;" and, for armed robbery, the sentencing judge has the authority to impose a penitentiary sentence for any term not less than three years.

applicable court decisions.

B. In all cases not involving the death penalty, wherein the jury may impose life sentence, the court may conduct a bifurcated trial. If the defendant is found guilty of an offense for which life imprisonment may be imposed, a sentencing trial shall be held before the same jury, if possible, or before the court if jury waiver is allowed by the court.

At the sentencing hearing:

- 1. The state may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty.
- 2. The defendant may introduce any evidence of extenuation or mitigation.
- 3. The state may introduce evidence in rebuttal of the evidence of the defendant.
- 4. A record shall be made of the above proceeding and shall be maintained in the office of the clerk of the trial court as a part of the record in that court.
- C. Upon conviction, [**28] or after a plea of guilty, in cases where the court has sentencing authority, there may be a hearing before the trial judge as follows:
- 1. A presentence investigation may be conducted and a report thereof shall be made as required for cases where the court has discretion in imposition of sentence. Contents of this report shall be disclosed only to the parties. A copy of said report shall be delivered to both the prosecutor and the defendant or the defense attorney within a reasonable time prior to sentencing so as to afford a reasonable opportunity for verification of the material. Prior to the sentencing proceeding each party is required to notify the opposing party and the court of any part of the report which the party intends to controvert by the production of evidence.
- 2. The state may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty.
- 3. The defendant may introduce evidence to contradict or supplement any information contained in the presentence investigation report.
- 4. The defendant may introduce any evidence of extenuation or mitigation.
- [*993] 5. The state may introduce evidence in rebuttal of the evidence of the defendant.
- 6. A record shall [**29] be made of the above proceedings and shall be maintained in the office of

the clerk of the trial court as a part of the record in that court.

P29. We note that HN10 pursuant to URCCC 10.04(B)(1), the State may introduce for the benefit of the sentencing jury "evidence of aggravation of the offense of which the defendant has been adjudged guilty." We also find guidance in Summerall v. State.nc... 734 So. 2d 242 (Miss. App. 1999). In Summerall, the defendant appealed his conviction and sentence for the sale of cocaine. On appeal, the Court of Appeals affirmed Summerall's conviction and sentence. One of the issues Summerall raised on appeal was that the trial judge had received improper evidence at the sentencing hearing. A unanimous Court of Appeals (two judges of ten not participating), stated:

P20. In his last assignment of error, Sumrall argues that the trial court erred in admission of evidence during the sentencing hearing. Specifically, he objects to the testimony of Agent Kirkman which informed the court of complaints from the community that Sumrall had been selling drugs, the pre-buy operation to investigate the complaints, known as intel buys, and four more felony sale cases against him. [**30] Sumrall failed to give any legal citation to support his claim that the trial court received improper evidence during the sentencing hearing. Failure to cite to legal authority bars any consideration of the assigned error. McClain v. State, 625 So. 2d 774, 781 (Miss. 1993) (citing Brown v. State, 534 So. 2d 1019, 1023 (Miss. 1988); Shive v. State, 507 So. 2d 898, 900 (Miss. 1987); Pate v. State, 419 So. 2d 1324, 1326 (Miss. 1982)).

- P21. Notwithstanding this procedural bar, this issue has no merit. Rule 10.04 (C)(2) and (3) of the Uniform Circuit and County Court Rules states in pertinent part:
- (b) The State may introduce evidence of aggravation of the offense to which the defendant has been convicted or pleaded guilty.
- (c) The defendant may introduce in evidence any evidence he deems necessary to contradict or supplement any information contained in the presentence investigation report.

Therefore, <u>HN11</u>[*] "[t]he trial judge here, sitting without a jury, had broad discretion in the things he was able to consider. He may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the

source from which it may come." Evans v. State. 547 So. 2d 38, 41 (Miss. 1989) [**31] (citing United States v. Barnett, 587 F.2d 252 (5th Cir. 1979)). "The imposition of a sentence is within the discretion of the trial court, and this Court will not review the sentence, if it is within the limits prescribed by statute." Reynolds v. State, 585 So. 2d 753, 756 (Miss. 1991) (citing Reed v. State, 536 So. 2d 1336, 1339 (Miss. 1988)), Boyington v. State, 389 So. 2d 485 (Miss. 1980)). "In imposing sentence, the trial court may take into account larger societal concerns, as long as the sentence is particularized to the defendant." Reynolds. 585 So. 2d at 756 (citation omitted). We find the trial judge did not abuse his discretion here.

Summerall, 734 So. 2d at 246-47 (Miss. App. 1999). (Emphasis added). Although Summerall involved a sentencing by the court, sitting without a jury in a noncapital [*994] case, 6 pursuant to URCCC 10.04(C), we find Summerall to be directly on point. Under both URCCC 10.04 (B) (sentencing by the jury) and URCCC 10.04(C) (sentencing by the judge), we find this identical provision: "The state may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty." Thus, HN12[1] if, as stated in Summerall, 7 admission of evidence of [**32] other crimes was proper under URCCC 10.04(C)(2) before the sentencing judge, it necessarily follows that admission of evidence of other crimes (including convictions) would likewise be proper under URCCC 10.04(B)(1) before the sentencing jury. After all, the sentencing jury should have available to it the same information as the sentencing judge, in order to arrive at the appropriate punishment. Certainly, while Taggart's 1986 Texas conviction for robbery would be totally irrelevant during the guilt/innocence phase of the trial, such information of prior criminal activity on the part of Taggart would be wholly relevant in aiding the jury to reach its decision as to whether Taggart should be sentenced to life imprisonment.

P30. <u>HN14[*]</u> URCCC 10.04(B) sets out the order of proof. First, the prosecution may introduce "evidence of aggravation of the offense" for which the defendant has been convicted. Next, the defendant has the opportunity to then introduce "any evidence of extenuation or mitigation." Finally, if the prosecution so chooses, it "may introduce evidence in rebuttal of the evidence of the defendant."

P31. We also take this opportunity to make a few additional observations about sentencing in general. HN15[*] There are at least four generally recognized factors that any sentencing judge should consider in the exercise of discretionary sentencing of any defendant who stands before the court for imposition of sentence: Rehabilitation; (2) Retribution; (3) Separation from society; and, (4) Deterrence, both general and specific. The judge, in exercising individualized sentencing, and considering all information that the judge may have on the particular defendant, should consider what sentence will hopefully have a rehabilitative effect on the defendant. The judge, in exercising individualized sentencing, should consider what sentence [**34] will hopefully have a retributive effect on the defendant - in other words, recognizing that society's law-abiding citizens have a right to expect from their judges that once a defendant is convicted of a crime, that defendant will "pay" for that crime, what sentence will appropriately punish that defendant for his/her crime. The judge, in exercising individualized sentencing, should consider whether the nature of the crime, the defendant's background, including the defendant's prior criminal history, and other relevant information requires that the defendant be punished by way of separation from society through a penitentiary sentence. Finally, HN16 1 the judge, in exercising individualized sentencing, should consider what sentence will hopefully have both a general and specific deterrent [*995] effect - in other words, a sentence that will generally deter society as a whole from engaging in criminal activity, and will specifically deter the particular defendant from engaging in future criminal activity. Again, we find that *HN17*[🏞] the sentencing jury should be able to consider the same factors as the sentencing judge, and the jury should be allowed to receive that information via appropriately admitted [**35] evidence in order to aid the jury in fulfilling its statutorily mandated sentencing duties.

P32. Other cases are also instructive. In <u>Hodges v. State</u>, 912 So. 2d 730 (Miss. 2005), Quintez Wren Hodges had been convicted of capital murder and sentenced to death. On appeal, Hodges raised roughly eighteen issues, including an attack on what he believed

⁶ <u>HN13</u>[*] Pursuant to <u>Miss. Code Ann. § 1-3-4</u> (Rev. 2005), the term "capital case" or "capital offense," when used in our statutes, denotes a criminal offense which is "punishable by death or imprisonment for life in the state penitentiary." On the other hand, the term "capital murder" denotes a criminal offense which is punishable by death or life imprisonment.

⁷In Summerall, the Court of Appeals relied on, *inter alia*, Evans v. State, 547 So. 2d 38, 41 (Miss. 1989). See also [**33] Reynolds v. State, 585 So. 2d 753, 756 (Miss. 1991). Summerall, 734 So. 2d at 246.

to be inadmissible prejudicial evidence offered during the sentencing phase. Hodges's sister had testified on direct examination that her brother was a normal child who never got into trouble. On cross-examination, the prosecution inquired whether she was aware of her brother's school burglary and a separate burglary and sexual assault. Hodges argued that this evidence of prior bad acts and crimes was inadmissible as being irrelevant to prove any of the statutory aggravating factors. See <u>Miss. Code Ann. § 99-19-101(5)</u> (Rev. 2000). Even though *Hodges* involved the prosecution's rebuttal of the defendant's evidence of extenuation or mitigation, we find the <u>Hodges</u> discussion relevant:

P40. Hodges also argues that the admission of these prior bad acts were prohibited, since they were not relevant to any of the statutory aggravating factors enumerated [**36] in Miss. Code Ann. § 99-19-101(5). Hodges alleges that the State is only allowed to offer evidence that is relevant to the statutory aggravating circumstances. However, HN18 Miss. Code Ann. § 99-19-101(1) provides that at the sentencing hearing "evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances." This Court has stated that the statute "does not limit the evidence that can be presented at the sentencing phase to evidence relevant to the aggravating circumstances." West v. State, 820 So. 2d 668, 670 (Miss. 2001). As discussed above, these prior bad acts were introduced when the defense opened the door to Hodges' character. Since § 99-19-101(1) allows any evidence that the court deems relevant to sentence and because these acts were relevant to rebut the direct testimony of Hodges' character, this assignment of error is without merit. This Court has also held that "the State is allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument." Wiley v. State, 750 So. 2d 1193, 1202 (Miss. 2000) (quoting Turner v. State, 732 So. 2d 937 at 950). [**37] As stated previously, these prior bad acts were admissible as proper rebuttal evidence. Therefore, this issue is without merit.

Id. at 756. (Emphasis added). <u>HN19</u> In **Hodges**, this Court unequivocally stated that during the sentencing phase of a capital murder trial, the State was not limited to presenting relevant evidence which went only to rebuttal of the defendant's mitigating evidence. Instead, we expressly stated that any evidence which the trial

court deemed to be relevant to sentence was admissible at the sentencing phase. Even though the sentencing hearings in death penalty cases are guided by statute, as opposed to uniform rule, we can logically deduce that if, in those cases where the sentencing jury is considering whether to impose the death penalty, the judge has discretion to allow [*996] the sentencing jury to consider "any evidence that the court deems relevant to sentence," then certainly the trial judge should not be hamstrung in non-death penalty cases concerning the admissibility of relevant evidence - such as a prior conviction - which would appropriately guide the sentencing jury in considering whether to impose life imprisonment upon a defendant convicted of kidnapping, rape [**38] and/or armed robbery.

P33. In <u>Almendarez-Torres v. United States. 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)</u>, the U.S. Supreme Court was confronted with an appeal involving a deported alien who impermissibly returned to the United States and committed a crime. Prior to his deportation, the alien had committed crimes. One of the issues before the Court was whether the district judge had imposed an excessive sentence upon the defendant by interpreting the applicable statute as authorizing enhanced punishment due to prior convictions, as opposed to establishing a separate crime for which the defendant must be specifically indicted. We find the following language from *Almendarez-Torres* instructive:

At the outset, we note that the relevant statutory subject matter is recidivism. That subject matter -prior commission of a serious crime -- is as typical a sentencing factor as one might imagine. See, e.g., USSG §§ 4A1.1, 4A1.2 (Nov. 1997) (requiring sentencing judge to consider an offender's prior record in every case); 28 U.S.C. § 994(h) (instructing Commission to write Guidelines that increase sentences dramatically for serious recidivists); 18 U.S.C. § 924(e) (Armed Career [**39] Criminal Act of 1984) (imposing significantly higher sentence for felon-in-possession violation by serious recidivists); 21 U.S.C. §§ 841(b)(1)(A)-(D) (same for drug distribution); United States Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics 35, 49 (for year ending Sept. 30, 1996, 20.3% of all federal cases involved offenders with substantial criminal records (criminal history categories IV-VI); 44.2% of drug cases involved offenders with prior convictions).

523 U.S. at 230, 118 S. Ct. at 1224, 140 L. Ed. 2d at

<u>359</u>. Later in *Almendarez-Torres*, the Court had this to say:

First, the sentencing factor at issue here recidivism -- is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. See, e.g., Parke v. Raley, 506 U.S. 20, 26, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992) (Recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States); U.S. Dept. of Justice, Office of Justice Programs, Statutes Requiring the Use of Criminal History Record Information 17-41 (June 1991) (50-state survey); USSG §§ 4A1.1, 4A1.2 (Nov. 1997) (requiring sentencing [**40] court to consider defendant's prior record in every case).

523 U.S. at 243, 118 S. Ct. at 1230-31, 140 L. Ed. 2d at 368.

P34. As the U. S. Supreme Court acknowledged, recidivism has been recognized since "colonial times," as one of the most important factors - if not the most important factor - in considering whether a criminal offender's sentence should be enhanced or increased upon being convicted yet again for criminal activity. It would thus defy logic to deny the sentencing jury the benefit of this critical information concerning a criminal's recidivism.

P35. In sum, we find that Taggart's 1986 Texas robbery conviction was relevant for the sentencing jury, consistent with URCCC 10.04(B)(1), and our case [*997] law. See also Miss. R. Evid. 401, 403. It necessarily follows that the trial court did not abuse its discretion in admitting this evidence during the sentencing phase of Taggart's trial. Therefore, we find this issue to be without merit.

CONCLUSION

P36. For the reasons stated, the DeSoto County Circuit Court judgment of conviction for rape, kidnapping and armed robbery and Taggart's separate sentences of life imprisonment to run consecutively are affirmed.

P37. COUNT 2: CONVICTION OF [**41] FORCIBLE RAPE AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT 3: CONVICTION OF KIDNAPPING AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS,

AFFIRMED. COUNT 4: CONVICTION OF ROBBERY USING A DEADLY WEAPON AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. SENTENCES SHALL RUN CONSECUTIVELY.

SMITH, C.J., WALLER, P.J., EASLEY, DICKINSON AND RANDOLPH, JJ., CONCUR. GRAVES, J., CONCURS IN RESULT ONLY. DIAZ, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. LAMAR, J., NOT PARTICIPATING.

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White v. State

Court of Appeals of Mississippi February 14, 2017, Decided NO. 2015-KA-01458-COA

Reporter

2017 Miss. App. LEXIS 81 *; 2017 WL 589908

CURTIS AARON WHITE A/K/A CURTIS WHITE A/K/A CURTIS A. WHITE, APPELLANT v. STATE OF MISSISSIPPI, APPELLEE

Subsequent History: Rehearing denied by, En banc White v. State, 2017 Miss. App. LEXIS 358 (Miss. Ct. App., June 13, 2017)

Writ of certiorari denied White v. State, 2017 Miss. LEXIS 389 (Miss., Sept. 21, 2017)

WHICH History: [*1] COURT **FROM** Prior APPEALED: YAZOO COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 08/27/2015. TRIAL JUDGE: TRIAL COURT LEWIS. **JANNIE** M. HON. DISPOSITION: CONVICTED OF TWO COUNTS OF GRATIFICATION OF LUST AND ONE COUNT OF STATUTORY RAPE AND SENTENCED TO SERVE OF **EACH** COUNT ON **YEARS EIGHT** GRATIFICATION OF LUST AND THIRTY YEARS FOR STATUTORY RAPE.

Disposition: REVERSED AND REMANDED.

Core Terms

circuit court, district attorney, closing argument, prejudicial, sexual, posts, <u>authenticate</u>, comments, defense counsel, <u>social-media</u>, admissible, reversible error, cross-examination, allegations, motive, prosecutorial misconduct, attorney's, raped, objected, inflammatory, reversal, assistant district attorney, years old, taking place, fair trial, purported, truck, cumulative effect, rules of evidence, statutory rape

Case Summary

Overview

HOLDINGS: [1]-In a statutory rape case, a trial court

erred when it denied defendant the opportunity to authenticate evidence of electronic communications on social media in an attempt to establish the defense theory regarding a victim's motive to fabricate allegations; [2]-It was error to deny defendant's motion in limine and trial objections regarding evidence of a highly prejudicial and minimally probative nine-year old uncharged statutory rape; [3]-It was error to admit evidence relating to an indictment in another county because it was not necessary to tell a full story, nor was it integrally related in time, place, or fact; [4]-Defendant was denied due process under Miss. Const. art. 3, § 14 and U.S. Const. amend. V due to acts of prosecutorial misconduct; [5]-Inter alia, there were improper comments on facts not in evidence, about defendant's character, and about the credibility of witnesses.

Outcome

Reversed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN1 Abuse of Discretion, Evidence

The standard of review regarding the admission and exclusion of evidence is abuse of discretion. Decisions regarding the relevance and admissibility of evidence are largely within the discretion of the trial court. The Mississippi Supreme Court has held that a trial court's evidentiary rulings will not be reversed unless the error adversely affects a substantial right of a party. An appellate court will not reverse an evidentiary ruling unless an abuse of discretion is shown, or the trial judge acted outside the rules of evidence.

Criminal Law & Procedure > Defenses > Right to Present

Evidence > Authentication

Evidence > Admissibility > Circumstantial & Direct Evidence

HN2[Defenses, Right to Present

A criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory. While a defendant is entitled to present his defense, the right is not without its limitations, as all evidence admitted in support of the defendant's theory of the case must comport with the Mississippi Rules of Evidence. Authentication is a condition precedent to admissibility of evidence. A party must make a prima facie showing of authenticity, and then the evidence goes to the jury, ultimately will determine the evidence's authenticity. Electronic evidence may be authenticated by the traditional means, and is adequately covered by the current rules of evidence, but the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium. Because socialmedia posts are subject to fabrication, something more than the account owner's name and photograph is required to authenticate the posts.

Evidence > Authentication

HN3[Evidence, Authentication

There is a a nonexhaustive list of possible ways to <u>authenticate</u> <u>social-media</u> evidence: the purported sender admits authorship, the purported sender is seen composing the communication, business records of an internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have access to the computer or cell phone, the communication contains information that only the purported sender could be expected to know, the purported sender responds to an

exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or other circumstances peculiar to the particular case may suffice to establish a prima facie showing of authenticity.

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Offers of Proof

<u>HN4</u>[] Objections & Offers of Proof, Offers of Proof

A proffer allows the nature and significance of the evidence to be evaluated.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

<u>HN5</u>[♣] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

Under <u>Miss. R. Evid. 404(b)</u>, evidence of crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Also under <u>Rule 404(b)</u>, however, this evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. <u>Miss. R. Evid. 403</u>.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

Evidence > Admissibility > Conduct Evidence > Sex Offenses

HN6[Exclusion of Relevant Evidence, Confusion,

Prejudice & Waste of Time

Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which the accused is on trial, if properly admitted under $\underline{\textit{Miss. R. Evid. 404(b)}}$, filtered through $\underline{\textit{Miss. R. Evid. 403}}$, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury, should not be considered per se error.

Evidence > Admissibility > Conduct Evidence > Sex Offenses

HN7[] Conduct Evidence, Sex Offenses

Derouen v. State does not automatically admit similar evidence or testimony involving sexual offenses, but has simply eliminated a per se exclusion on such evidence.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

<u>HN8</u>[♣] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

When the trial court admits other bad acts evidence under <u>Miss. R. Evid. 404(b)</u>, it should make an on-the-record <u>Miss. R. Evid. 403</u> finding that the probative value is not substantially outweighed by the danger of unfair prejudice.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

<u>HN9</u>[基] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

It is the necessity by the State to use the other evidence in order to tell a coherent story that is the key to its

admissibility. But evidence which is not necessary for the State to prove its case could be unduly prejudicial to the defendant. Otherwise inadmissible evidence of prior bad acts is admissible in instances where the prior bad acts are integrally related in time, place, and fact with the crime for which the defendant is being tried.

Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Tests for Prosecutorial Misconduct

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

<u>HN10[</u> Closing Arguments, Evidence Not Admitted

Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow. The standard of review which appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created. The purpose of a closing argument is to fairly sum up the evidence. Prosecutors are not allowed to employ tactics which are inflammatory, prejudicial, or reasonably calculated to unduly influence the jury. The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts. Counsel cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence.

Criminal Law & Procedure > Appeals > Reversible Error > Cumulative Errors

HN11[♣] Reversible Error, Cumulative Errors

Under the cumulative-error doctrine, individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. The case law of Mississippi allows an accumulation of otherwise harmless error to result in reversal. Aggregate instances of prosecutorial misconduct can lead to reversal.

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

<u>HN12</u> Prosecutorial Misconduct, Prohibition Against Improper Statements

A prosecutor should abstain from incorporating his or her personal beliefs into the presentation of his case. A court is not constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made. While it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court, if a comment is so inflammatory that the trial court should have objected on its own motion, the point may be considered.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > Failure to Object

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Prosecutorial Misconduct

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

<u>HN13</u> Procedural Due Process, Scope of Protection

In general, the failure to object to the prosecution's statements in closing argument constitutes a procedural bar. Despite the procedural bar, an appellate court may address the statements if they were so inflammatory that the trial judge should have objected on her own motion. As applied to failures to contemporaneously object during closing arguments, plain error may only be found if the inflammatory or prejudicial comments have the natural and probable effect of creating an unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created. A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. As has long been the rule under both the Constitutions of the United States and of Mississippi, no person shall be deprived of life, liberty, or property except by due process of law. Miss. Const. art. 3 § 14; U.S. Const. amend. V. While a defendant is not entitled to a perfect trial, he is certainly entitled to a fair trial by an impartial jury. U.S. Const. amend, XIV; U.S. Const. amend. VI.

Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

<u>HN14[</u> Closing Arguments, Evidence Not Admitted

It is improper for a prosecuting attorney to comment on evidence excluded by the court.

Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper

Statements

<u>HN15[**]</u> Closing Arguments, Evidence Not Admitted

Arguing statements of fact which are not in evidence or necessarily inferable from facts in evidence is error when those statements are prejudicial.

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

<u>HN16</u>[Prosecutorial Misconduct, Prohibition Against Improper Statements

Prosecuting attorneys should refrain from doing or saying anything that would tend to cause the jury to disfavor the defendant due to matters other than evidence relative to the crime. It is impermissible to use appeals to the fears of juries, such as a defendant's future danger to society, at the guilt or sentencing phases of trials. Statements that imply a defendant will commit crimes in the future if acquitted are improper.

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

<u>HN17</u>[Closing Arguments, Inflammatory Statements

A prosecutor is forbidden from interjecting his personal beliefs regarding the veracity of witnesses during closing argument. In cases where such remarks were made in response to defense's counsel's arguments or misconduct, the comments were not considered reversible error.

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

<u>HN18</u> Prosecutorial Misconduct, Prohibition Against Improper Statements

In a criminal case, the district attorney should be careful not to indulge in personal abuse or vilification of the defendant and should not appeal to passion and prejudice. It is improper for him to indulge in intemperate characterization, personal abuse, or vilification of the accused, tending solely to arouse or to inflame the passion and prejudice of the jury against him, even where such comments are to some extent supported by the evidence. Further, the jury's decision must be based on the evidence; thus any verdict based on bias, passion, or prejudice will be overturned.

Counsel: FOR APPELLANT: RICHARD T. STARRETT.

FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: ALICIA MARIE AINSWORTH.

DISTRICT ATTORNEY: AKILLIE MALONE-OLIVER.

Judges: BEFORE LEE, C.J., BARNES AND ISHEE, JJ. GREENLEE, J., CONCURS. LEE, C.J., BARNES AND FAIR, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J., AND CARLTON, J.; WILSON, J., JOINS IN PART. WESTBROOKS, J., NOT PARTICIPATING.

Opinion by: ISHEE

Opinion

NATURE OF THE CASE: CRIMINAL - FELONY

ISHEE, J., FOR THE COURT:

P1. On August 27, 2015, Curtis White was convicted in Yazoo County Circuit Court of two counts of gratification of lust and one count of statutory rape. Counts I and III of the indictment charged White with gratification of lust and the statutory rape of MM,¹ and Count II charged White with gratification of [*2] lust for LM. White was

¹The names of the minor victims are changed for confidentiality purposes.

sentenced to serve eight years for each count of gratification of lust and thirty years for the statutory-rape charge. White's statutory-rape sentence was to be served without the possibility of early release, and was to run concurrently with one count of gratification of lust, and consecutively to the other count. White timely appealed and argues that the circuit court committed a plethora of reversible errors. We agree. Because the circuit court repeatedly abused its discretion and violated White's constitutional rights of due process and a fair trial by an impartial jury, we reverse and remand.

STATEMENT OF FACTS

P2. White was MM's uncle by marriage, and LM was close friends with MM. White was tried for incidents that occurred in Yazoo County on April 30, 2013, and April 21, 2014. Both counts of gratification of lust stemmed from the alleged events on April 30, 2013. At that time, MM was approximately thirteen years old (born on December 28, 2000), LM was approximately twelve years old (born on January 25, 2001), and White was approximately thirty-two years old (born on March 13, 1981). MM testified that White gave her and a few of her friends beer while they [*3] rode horses together, before White drove MM and LM back home. MM alleged that while White was driving them home, he showed the girls pornography on his cell phone, handed the cell phone to MM, and told both girls to watch it. It was further alleged that White then lifted MM's and LM's shirts to touch their breasts and compare whose breasts were bigger. MM testified that White told her that her breasts were larger. White then continued to drive the girls home without further incident. MM testified that she did not tell anyone about the incident.

P3. Count III of the indictment stemmed from events that allegedly took place on April 21, 2014. MM testified that she, along with others, helped White move a deck onto his property. She testified that White insisted that she ride in his truck with him while he pulled a trailer attached to the back of the truck, and while the other people helping rode in a separate vehicle following behind them. MM testified that while she was driving the truck, White put her hand on his penis while he put his hand on her vagina. MM alleged that when they arrived back at White's house, White insisted that he, as opposed to his wife Claire, should drive MM back [*4] to her house so that MM could attend an appointment later.² MM testified that White drove the truck behind a

pond and parked the car, where she alleged that he took her clothes off, performed oral sex on her, engaged in vaginal and anal sex with her, and then placed her hand on his penis and moved it back and forth "until stuff came out." She testified that she got dressed as he drove the truck to her grandmother's house, who then took her to her appointment. MM testified that the sexual acts that took place behind the pond lasted "ten minutes at most."

P4. Additional witnesses who testified recalled events differently than MM, and Lane Twiner testified that he rode in the back of the trailer attached to White's truck during the time MM alleges he touched her vagina while she touched his penis. Twiner testified that White, not MM, drove the truck, and that he kept eye contact on White because he was providing directional hand signals to White since the trailer's load obstructed the rear view. Twiner testified that there was a tool box between White and MM in the passenger seat, and that he saw no sexual activity occur between the two. Twiner noted that when White pulled into his driveway [*5] with the trailer, he "took out his mailbox." This was not mentioned by MM, who testified that she was driving.

P5. White testified in his own defense at trial and in regard to the alleged events of April 30, 2013. He asserted that he neither showed MM or LM pornography nor ever lifted up their shirts. In response to the alleged events of April 21, 2014, he stated that he did not direct MM to ride with him in his truck, and confirmed that Twiner was riding on the trailer attached to the truck, and that he knocked down his mailbox when he pulled into his driveway. White testified that MM's mother called to say that MM had to be home for her appointment, and stated that Claire gave MM some hotdogs to take with her before White drove MM to her grandmother's house. White denied stopping anywhere on the drive back, said MM's grandmother pulled into the driveway when they arrived at the house, and claimed that he was around MM and others over the next several days and she did not act like anything was wrong or out of the ordinary.

P6. Prior to the trial, White made a motion in limine to exclude any evidence that he engaged in an affair with a fifteen-year-old named AB when he was approximately [*6] twenty-three years old. The affair occurred nine years prior to the trial, and White was never charged with a crime stemming from the affair. The circuit court denied White's motion in limine and all

²MM was attending counseling appointments for behavioral issues; however the circuit court excluded evidence regarding

the specificity of the appointments during pretrial motions.

contemporaneous objections during the trial that pertained to the affair.

P7. At trial, the State was allowed to present evidence, over the defense's vehement objections, that MM alleged White statutorily raped her on July 4, 2012, at Wolf Lake in Humphreys County, Mississippi. That incident was under indictment in a separate county and was not part of any charge that White was tried for in Yazoo County-the trial from which this appeal stems. MM provided the details of that incident in a handwritten statement prepared on January 19, 2015. In the written statement, MM alleged that on July 4, 2012, she, along with her sister and two of White's daughters, went with White to the lake to prepare for the July 4th festivities taking place later that day. Also in her written statement, she said White sexually assaulted her and that he threatened to hurt her and anyone she told. However, on direct examination at trial, MM testified that the alleged events took place a few days before July 4, 2012. [*7] MM testified that White asked her to go into the lake with him to retrieve water jugs he placed in the water to attract fish. She told the jury that White then grabbed her head and forced it under water and made her perform oral sex on him until she could not breathe. She then testified that he engaged in vaginal sex with her and that she did not tell anyone when they returned to the festivities because she was afraid he would hurt her.

P8. On cross-examination, MM admitted that the pictures that defense counsel showed her were taken after the alleged rape occurred on July 4, 2012, and depicted her having a good time. On redirect, the assistant district attorney led MM to say again that the rape actually occurred a few days prior to the Fourth of July party where the pictures were taken.

P9. Additional evidence was presented at trial, over defense counsel's objections, that White cheated on his first wife, Karen Hemphill, and gave her STDs on two separate occasions. The circuit court allowed further testimony that White gave Hemphill one of the STDs while she was pregnant. Hemphill testified that when this occurred, she was approximately seventeen years old and White was eighteen years [*8] old.

P10. After deliberations, the jury returned a verdict of guilty on all three counts. White timely appeals to this Court for relief.

DISCUSSION

P11. It is long established that <u>HN1[*]</u> the standard of

review regarding the admission and exclusion of evidence is abuse of discretion. Newell v. State, 49 So. 3d 66, 71 (¶9) (Miss. 2010). Decisions regarding the relevance and admissibility of evidence are "largely within the discretion of the trial court." Mabus v. State, 809 So. 2d 728, 733 (¶24) (Miss. 2001). The Mississippi Supreme Court has held that a trial court's evidentiary rulings will not be reversed "unless the error adversely affects a substantial right of a party." Id. (citing Mingo v. State, 944 So. 2d 18, 28 (¶23) (Miss. 2006)). This Court will not reverse an evidentiary ruling "unless an abuse of discretion is shown, or the trial judge acted outside the rules of evidence." Id.

I. The circuit court erred by denying White the opportunity to <u>authenticate</u> evidence of electronic communications to attempt to establish the defense's theory regarding MM's motive to fabricate allegations.

P12. HN2[*] "A criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory." Edmonds v. State, 955 So. 2d 787, 798 (¶29) (Miss. 2007), "While a defendant is entitled [*9] to present his defense, the right is not without its limitations, as 'all evidence admitted in support of the defendant's theory of the case must comport with the Mississippi Rules of Evidence." Scott v. State, 2014-KA-00572-COA, 2016 Miss. App. LEXIS 404, 2016 WL 3391630, at *2 (¶12) (Miss. Ct. App. June 21, 2016) (quoting Clark v. State, 40 So. 3d 531, 542 (¶30) (Miss. 2010)). Authentication is a condition precedent to admissibility of evidence. Smith v. State, 136 So. 3d 424, 432 (¶18) (Miss. 2014). "A party must make a prima facie showing of authenticity, and then the evidence goes to the jury, which ultimately will determine the evidence's authenticity." Id. (citing Young v. Guild, 7 So. 3d 251, 262 (§32) (Miss. 2009)). "Electronic evidence may be authenticated by the traditional means, and is adequately covered by the current rules of evidence, but "the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium." Id. Because social-media posts are subject to fabrication, "something more" than the account owner's name and photograph is required to authenticate the posts. Id. at (120).

P13. In this case, the State made a pretrial motion in limine to prevent White from using social-media evidence at trial. White sought to use social-media

posts purported to be from MM to establish the defense's theory that MM was lying and that the alleged events never took place. The social-media posts [*10] were discovered by family friend Brenda Dew, who reported the posts to MM's mother. The posts depicted MM kissing and engaging in romantic conversations with another female, testimony from her mother regarding text messages she found on MM's phone, MM's behavioral issues, and testimony from Dew supported the validity of the social-media posts. White further sought to offer testimony from various family members of MM that she was seeing a counselor for behavioral problems, that the family had a large fight when informed of MM's social-media posts, and that the family sent MM to a church camp upon hearing of the posts. White sought to introduce the electronic communications and testimony under Mississippi Rule of Evidence 404(b)3 as evidence of MM's motive to fabricate the allegations against White. However, the State opposed admission of this evidence, arguing it was irrelevant, improper evidence of the victim's sexual past under Mississippi Rule of Evidence 412, and inadmissible due to a lack of authentication under Mississippi Rule of Evidence 901. The circuit court interrupted the State's argument against the admission of the aforementioned evidence, and stated:

Well let me say this. As far as the posting on <u>social[-]media</u>, that is not relevant. There's no way we can <u>authenticate</u> [*11] that. So that motion—as far as the posting, that motion is granted. That will not be reliable, would not be admissible, the <u>social-media</u> posting, okay. Now go ahead.

P14. In <u>Smith, 136 So. 3d at 433 (¶21)</u>, the supreme court delineated a nonexhaustive list of possible ways to <u>authenticate</u> <u>social-media</u> evidence. The supreme court listed the following:

HN3 [4] [T]he purported sender admits authorship, the purported sender is seen composing the communication, business records of an internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have access to the computer or cell phone, the communication contains information that only the purported sender

P15. While we decline to delve into the merits of the various evidentiary arguments, specifically those regarding Rules 404(b) and [*12] 412, presented by the State and the defense on this issue, we find that the circuit court abused its discretion in refusing to allow the defense the opportunity to even attempt to authenticate the evidence. At minimum, the circuit court should have allowed the defense the chance to proffer the authenticity of the evidence with the court, outside the presence of the jury. HN4 A proffer allows the nature and significance of the evidence to be evaluated." Trotter v. State, 878 So. 2d 248, 251 (¶11) (Miss. Ct. App. 2004). Because the nature of these types of child-victim cases inherently involves evidence, evidence circumstantial, word-of-mouth supporting MM's motive to lie is relevant. Under the specific facts of this case, we find that it was reversible error to deny White the chance to authenticate the proposed evidence, especially in light of the significance the evidence had to White's defense.

II. The circuit court erred in denying White's motion in limine and trial objections regarding evidence of the nine-year-old uncharged statuary rape of AB and an indictment in Humphreys County.

P16. <u>HN5</u>[*] Under <u>Rule 404(b)</u>, "[e]vidence of crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Also under <u>Rule 404(b)</u>, however, [*13] this evidence may "be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." <u>M.R.E. 403</u>.

P17. In <u>Derouen v. State, 994 So. 2d 748, 756 (¶20)</u> (<u>Miss. 2008</u>), the supreme court held:

HN6[*] [E]vidence of a sexual offense, other than the one charged, which involves a victim other than

could be expected to know, the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or other circumstances peculiar to the particular case may suffice to establish a prima facie showing of authenticity.

³We note that the Rules of Evidence have been restyled to include nonsubstantive revisions since the time of White's trial. We apply the version of the rules in effect at that time.

the victim of the charged offense for which the accused is on trial, . . . if properly admitted under <u>Rule 404(b)</u>, filtered through <u>Rule 403</u>, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury, should not be considered per se error.

P18. In pretrial hearings and on appeal, the State used the rule established in Derouen to argue that a nineyear-old, uncharged statutory rape committed by White as part of an extramarital affair was admissible in his trial for the forcible statutory rape of MM. The State argued that such "bad-acts evidence" was admissible to show White's motive, intent, opportunity, and [*14] pattern in committing sexual acts against underage girls. Here, the circuit court misapplied the principle established in Derouen; HN7[1] it does not automatically admit such similar evidence or testimony, but simply eliminated a per se exclusion on such evidence. The proposition that an uncharged, factually dissimilar, and almost decade-old offense contains probative value that substantially outweighs the threat of unfair prejudice to the defendant's constitutional rights is certainly a stretch.

P19. MM alleged that White raped her behind a barn on April 21, 2014, and that he first raped her when she was eleven years old, in the incident that allegedly took place in Humphreys County on July 4, 2012. As previously discussed, MM testified that on July 4, 2012, White forced MM to perform oral sex on him while he held her head under water until she could not breathe, vaginally penetrated her, and told her that if she told anyone about what he did to her, that he would "hurt [her] and whoever [she] told."

P20. Contrasting those allegations with the testimony that AB gave at trial, it is clear that White's affair with AB is not probative of his plan, motive, intent, or opportunity in regard to MM. [*15] AB testified that her affair with White was based on a "mutual flirtation" and that White "was never forceful with [her]." Further, at the time of the affair, White was approximately twenty-four years old, while AB was between fifteen and seventeen years old. In the case at hand, White was accused of being a thirty-three-year-old uncle who repeatedly forcibly raped his eleven-year-old niece for several years. The two scenarios are hardly factually similar in a way that allows <u>Derouen</u> to be a persuasive supporting

argument.

P21. Additionally, the circuit court failed to make a detailed finding on the record explaining its decision to allow such evidence to be heard by the jury. When the State opposed White's motion in limine, it essentially just read the language of *Rule 404(b)* and argued that the nine-year-old uncharged statutory-rape affair was admissible, seemingly under all nine delineated permitted uses of the Rule; it never offered one permitted use as more appropriate than any other. Though defense counsel responded persuasively in arguing to exclude such evidence, the circuit court made the following ruling on the record:

The [c]ourt[,] after using the filter test under $\underline{403}$ as to the probative [*16] or prejudicial effect, as well as $\underline{404(b)}$, as to why the State wishes to offer the evidence, . . . finds the case law in this area is pretty clear, and as late as . . . 2013, the Supreme Court held that if the evidence is found to be more probative than prejudice [sic] and it is filtered through $\underline{404(b)}$ as to why the State wished to offer the evidence, then the evidence is admissible. The court finds that the reasons the State gives for the offering of the evidence is [sic] proper pursuant to $\underline{404(b)}$, that the evidence is more probative than prejudicial and that the—there will be a cautionary instruction given to the jury

P22. The circuit court did not cite any permitted use under Rule 404(b) in its decision, but merely parroted the generalized and blanketed argument made by the district attorney that the evidence was admissible under such rule. HN8 | When the trial court admits other bad acts evidence under Rule 404(b), it should make an on-the-record Rule 403 finding that the probative value is not substantially outweighed by the danger of unfair prejudice." Archer v. State, 118 So. 3d 612, 625 (¶57) (Miss. Ct. App. 2012) (citing Tate v. State, 912 So. 2d 919, 925 (¶16) (Miss. 2005)). While the circuit court did make the aforementioned required finding on the record, it failed to find under which permitted use listed in Rule 404(b) the [*17] evidence would be admitted. The circuit court merely cited the entirety of the Rule in its decision to admit the evidence, which would allow an inference to be made that the evidence was admitted to show preparation—a permitted use under which a nineyear-old, factually dissimilar act certainly could not properly be admitted. This Court finds that the circuit court abused its discretion in admitting the highly prejudicial and minimally probative nine-year-old, uncharged statutory-rape evidence, and as such,

⁴ It was unclear how old White was when the affair began, but the record shows that it lasted for approximately two years, ending when AB was seventeen years old.

committed reversible error.

P23. As part of the same motion in limine, defense counsel sought to exclude testimony from Brenda Dew, an adult woman who asserted vague allegations that White made sexual advances on her. Because the circuit court failed to specify which aspect of White's motion that her ruling applied to, defense counsel attempt to clarify the ruling with the court, and the following exchange took place on the record:⁵

Mr. Hollomon: But I want to make sure—I mean, my motion goes to [Dew's testimony] also, that that be excluded also.

The Court: My ruling goes to that as well. As long as it's offered for the reasons pursuant to Rule given a limited it will be and 404(b) instruction, [*18] okay. It goes to any prior victims or statements that have been filtered under 404(b). Mr. Hollomon: Your Honor, just so the Court is clear on this and I'm clear on this, Brenda Dew is an adult woman who was a neighbor and friend of the White family who's making these allegations. I don't know how that would play into gratification of lust and a charge of statutory rape.

The Court: Making allegations of what?

Mr. Hollomon: She's made vague allegations that Curtis [White] made sexual advances toward her.

The Court: Yeah. It comes under 404(b).

Mr. Hollomon: To prove what, Your Honor, if I may ask the State?

The Court: The same—that the State stated that they would offer to prove.

Mr. Hollomon: The same reasons that were given? The Court: Okay. Now, I'm not going to sit here—I've made my ruling on that. I'm not going to sit here and—

Mr. Hollomon: I'm just trying to be clear for any appellate record, Your Honor.

The Court: Well, the trial will make it clear for any appellate record. Basically, i told you if it comes under <u>404(b)</u>, which is what the State has offered to prove it—

Mr. Hollomon: I understand-

The Court: —that's why they're offering it—then it's admissible.

⁵ Joseph Hollomon was Curtis White's defense attorney, and Akillie Malone-Oliver was the district attorney prosecuting the case.

Mr. Hollomon: For what—I'm [*19] trying to understand, Your Honor. I'm sorry. Bear with me.

The Court: I'm not going to sit here and tell you whether it's for the pattern, the opportunity, the motive, the plan. Basically, they've offered to prove that—to show that through that 404(b) filtering.

Mr. Hollomon: But I think they have to state for what purpose it's going to be offered.

The Court: And I think they just did, didn't they?

Mr. Hollomon: Not with respect to Ms. Dew, Judge. And I'm sorry if I—

The Court: Would you tell him why you're offering Ms. Dew's testimony?

Ms. Malone-Oliver: For those same filtering things that we just stated: Opportunity, intent, preparation, plan and all that, identity, absence of mistake or accident.

The Court: Okay. Anything further? Mr. Hollomon: No, Your Honor.

P24. As is shown from the record, the circuit court wholly failed to conduct any type of balancing test required under <u>Rule 403</u> in regard to the testimony of Dew. Further, evidence of White making sexual advances on Dew, an adult woman, is completely devoid of any relevance or probative value to White's charges of illegal sexual conduct with an underage female. Its lack of probative value is illustrated by the circuit court's inability, and [*20] outright refusal, to specify under which permitted use in <u>Rule 404(b)</u> Dew's testimony was admissible. The admission of such prejudicial evidence is an abuse of discretion by the circuit court and constitutes reversible error.

P25. For the same reasons as stated above, we find that the circuit court abused its discretion in admitting evidence of bad acts that occurred in Humphreys County that were part of a separate indictment in that county. The incident that took place in Humphreys County allegedly occurred two years before the acts for which White was tried and convicted. The district attorney made reference to the Humphreys County incident in her opening statement, to which defense counsel contemporaneously objected. At a bench conference, the district attorney merely asserted that she was allowed to present the two-year-old evidence from a separate county because she had "to tell the full story as far as how it started." She made only vague references to "case law on point" but failed at that moment, or any other moment, to cite any names or jurisdictions from which the case law came.

P26. The supreme court has ruled on the admissibility of

evidence in order to complete the narrative and tell [*21] a "full story." In Flowers v. State, 773 So. 2d 309, 324 (¶47) (Miss. 2000), the court held that HN9[**] "[i]t is the 'necessity' by the State to use the other evidence . . . in order to tell a coherent story that is the key to its admissibility." But the court further cautioned that "evidence which is not necessary for the State to prove its case . . . could be unduly prejudicial to the defendant." Id. The court clarified Flowers in Keller v. State, 138 So. 3d 817, 854 (¶93) (Miss. 2014), by applying a principle established in Wheeler v. State, 536 So. 2d 1347, 1352 (Miss. 1988). The court explained that "otherwise inadmissible evidence of prior bad acts is admissible in instances where the prior bad acts are 'integrally related in time, place[,] and fact with the' crime for which the defendant is being tried." Keller, 138 So. 3d at 854 (¶93).

P27. Here, the evidence of the Humphreys County incident is not adequately integrally related under the rule established in <u>Wheeler</u>. The incidents were two years apart, in two separate counties, and consisted of different sets of facts, as set forth above in this opinion. Such an admission forced White to not only defend himself against the charges for which he was actually on trial in Yazoo County, but also defend a charge triable in a completely separate county. Because such evidence is neither necessary to fully tell a story nor integrally related in time, [*22] place, or fact, the circuit court erred in admitting such prejudicial evidence.

III. White was denied due process by the repeated and persistent acts of prosecutorial misconduct by the district attorney and assistant district attorney.

"Where prosecutorial misconduct P28. HN10 1 endangers the fairness of a trial and the impartial administration of justice, reversal must follow." Goodin v. State, 787 So. 2d 639, 653 (¶41) (Miss. 2001) (citing Acevedo v. State, 467 So. 2d 220, 226 (Miss. 1985)). "The standard of review which [appellate courts] must apply to lawyer misconduct during opening statements or closing arguments is 'whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." Wilson v. State, 194 So. 3d 855, 864 (¶30) (Miss. 2016). "The purpose of a closing argument is to fairly sum up the evidence." Id. (citing Galloway v. State, 122 So. 3d 614, 643 (¶72) (Miss. 2013)). Prosecutors "are not allowed to employ tactics which are 'inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." Id. "The prosecutor may comment upon any

facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts." *Id.* "Counsel 'cannot, however, state facts which are not in evidence, and which the court does not [*23] judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence." *Id.*

P29. <u>HN11</u> "Under the cumulative-error doctrine, individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." <u>Harding v. State, 17 So. 3d 1129, 1133 (¶13) (Miss. Ct. App. 2009).</u> The case law of our state "allows an accumulation of otherwise harmless error to result in reversal." <u>Flowers. 773 So. 2d at 334 (¶82)</u>. Aggregate instances of prosecutorial misconduct can lead to reversal. <u>Stringer v. State, 500 So. 2d 928, 930-31 (Miss. 1986)</u>.

P30. Throughout White's trial, the district attorney made numerous prejudicial, inflammatory, and improper comments. While the comments may not be reversible standing alone, the cumulative effect of the otherwise harmless errors warrants reversal. Though the instances of misconduct are plentiful, we only address the most egregious for the sake of brevity.

A. Comments on Cross-Examination of LM

P31. During the cross-examination of LM, defense counsel asked, "[MM] had moved in 2013 with her father and then back with her mother?" The district attorney then made a speaking objection, in the presence of [*24] the jury, and stated, "Object to the relevance of where [MM] was living. We are here because Curtis [White] was raping her." Such an inflammatory comment is improper and only serves to prejudice the jury against White.

B. Comments on Cross-Examination of White

P32. White testified in his own defense at trial, and during the district attorney's cross-examination of him, she inquired about testimony LM gave regarding riding horses alone with White and MM on occasion. White responded to the inquiries by refuting LM's testimony and testified that they had never ridden horses alone together. After the district attorney unsuccessfully attempted to bait White into calling LM a liar and then proceeded to badger him about "what did happen," she made the following statement in front of the jury: "What

would you do? What would you do? I know what you've been accused of happened. But I'm talking about what happened between you and [LM] and [MM], when you would all be together?" (Emphasis added). White responded, "Nothing."

P33. "The law is clear that HN12 [a prosecutor should abstain from incorporating his or her personal beliefs into the presentation of his case." Lewis v. State. 905 So. 2d 729, 736 (¶24) (Miss. Ct. App. 2004) (citing United States v. Young, 470 U.S. 1, 9-10, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). Though White's counsel did [*25] not contemporaneously object after the district attorney expressed her personal belief of the defendant's guilt, the supreme court has held that a court is "not . . . constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made." Randall v. State, 806 So. 2d 185, 210 (¶57) (Miss. 2001). While "it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court," if a comment is "so inflammatory that the trial court should have objected on [its] own motion, the point may be considered." Evans v. State, 725 So. 2d 613, 670 (¶241) (Miss. 1997); Gray v. State. 487 So. 2d 1304, 1312 (Miss. 1986).

P34. The district attorney's blatant projection of guilt onto White, in the presence of the jury, is so and extremely unfairly prejudicial, inflammatory, improper that in this circumstance defense counsel's lack of objection an does not bar the issue from our consideration on appeal. The district attorney later made additional prejudicial comments during her crossexamination of White. She asked White several questions about "raping" MM and LM, and when White responded that she was wrong, she said, "Isn't it true, that not only did you [rape MM and [*26] LM], but that's the same pattern, whenever you get an opportunity around kids . . . ?" (Emphasis added). Again, defense counsel did not contemporaneously object, but as stated above and applying the same precedent, we find that under the circumstances of this case, the lack of an objection does not bar this issue from our consideration on appeal.

P35. An additional error was made during the crossexamination of White when the circuit court admitted irrelevant and inadmissible character evidence. Somewhat randomly, the district attorney asked White if he had been unfaithful to his first wife, to which defense

counsel objected. The following interaction took place:

Ms. Malone-Oliver: He has [a] character witness that's coming in. They're going to talk about what a great person he is

The Court: So this line of questioning is going where?

Ms. Malone-Oliver: To the person, to him.

The Court: Character.

Ms. Malone-Oliver: Hmm hmm.

The Court: That's it.
Ms. Malone-Oliver: Yeah.

P36. Defense counsel quickly responded that the fact that the evidence was being used for character purposes was the exact reason it was inadmissible under <u>Rule 403</u>. The district attorney realized her slip and clarified her [*27] position:

Ms. Malone-Oliver: He opened the door with that talking about his family life and how he's been with her. He did that. I should be able to question him about his family life. That's all I'm doing.

The Court: Well the thing of it, when we got into this earlier, it went into credibility.

Ms. Malone-Oliver: I'm not talking about-

The Court: No, I'm talking it when [sic] to credibility. Ms. Malone-Oliver: Right, and that's what I'm talking about it [sic]. That's what I'm using it for.

The Court: Not character.

Ms. Malone-Oliver: Right. I'm sorry. I misspoke.

The Court: As long as it go [sic] to credibility and not his character.

Ms. Malone-Oliver: And his ability to tell the truth and honesty and how he lies.

P37. The circuit court then overruled the objection and allowed the district attorney to question White about if he and his first wife, Karen Hemphill, whom he married when he was eighteen and has since divorced, separated because he was "lying, being untruthful, and being unfaithful on several occasions." The admission of prejudicial and irrelevant evidence did not stop there, but continued when the district attorney asked, in the presence of the jury, if White gave his first wife [*28] "two STD[]s while she was pregnant." After defense counsel objected, had the jury admonished to disregard the question, and unsuccessfully moved for a mistrial, the district attorney then asked White if he divorced his "first wife while she was pregnant." Again, defense counsel objected, the jury was admonished to disregard the question, and he unsuccessfully moved for a mistrial. Defense counsel unsuccessfully moved for mistrial two additional times during the crossexamination of White.

P38. Not only was the evidence that White gave his wife two STDs due to an affair wholly irrelevant to the crimes charged, but it was unfairly prejudicial and substantially outweighed any probative value it may have had. Further, the State inadvertently admitted it was opening its own door to character evidence. The district attorney argued that White would have character witnesses testify in the future, so she should be allowed to attack his character on his cross-examination, before such witnesses testified. Such an argument misunderstands the plain language of Rule 404(a)(1), which only allows a prosecutor to offer "[e]vidence of a [defendant's] pertinent trait" to "rebut" evidence the defendant presented first. (Emphasis [*29] added). "The defense must be responsible for opening the door before the State is entitled to enter." McGee v. State, 853 So. 2d 125, 131 (¶13) (Miss. Ct. App. 2003).6

P39. Twice during the district attorney's crossexamination of White defense counsel objected to the district attorney's mischaracterization of the evidence and facts. The first time he objected, the circuit court responded, "[J]ury will recall the testimony," to which the district attorney immediately interjected, "[j]ury remembers." The second occasion, before the circuit court could respond, the district attorney quipped, "The jury knows." The district attorney's comments are inappropriate and outside the scope of the authority possessed by a prosecutor. Evidentiary rulings are to be left to the court, and prejudicial comments that are predominately made to tarnish the defense's credibility are improper. While the aforementioned instances of misconduct may not rise to the level of reversible error or plain error on their own, the cumulative effect of the misconduct substantially prejudiced White and denied him the constitutional rights of due process and a fair trial.

C. Comments During Closing Arguments

P40. <u>HN13</u>[*] "In general, the failure to object to the prosecution's statements in closing argument [*30] constitutes a procedural bar." <u>Ross v. State</u>, 954 So. 2d 968, 1001 (¶71) (Miss. 2007) (citing <u>Spicer v. State</u>, 921

⁶ On cross-examination of defense witness Wesley Womble, the State asked: "And you're saying that pretty much Curtis [White] is a good guy?" Defense counsel immediately objected because on direct examination, Womble was only asked about White's truthfulness. The circuit overruled the objection, and allowed the State to attack Womble's opinion with specific bad-acts evidence. This is another example of the district attorney opening her own door to character evidence.

So. 2d 292, 309 (Miss. 2006)). Despite the procedural bar, this Court may address the statements if they were "so inflammatory that the trial judge should have objected on [her] own motion." O'Connor v. State, 120 So. 3d 390, 399 (¶23) (Miss. 2013). As applied to failures to contemporaneously object during closing arguments, plain error may only be found if the inflammatory or prejudicial comments have the "natural and probable effect of . . . creat[ing an] unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." Mitchell v. State, 21 So. 3d 633, 642 (¶31) (Miss. Ct. App. 2008) (quoting Dampier v. State, 973 So. 2d 221, 235 (¶39) (Miss. 2008)). "A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice." McGee v. State, 953 So. 2d 211, 215 (98) (Miss. 2007). As has long been the rule under both the Constitutions of the United States and of Mississippi, "[n]o person shall be deprived of life, liberty, or property except by due process of law." Miss. Const. art. 3 § 14; see also U.S. Const. amend. V. While a defendant is not entitled to a perfect trial, he is certainly entitled to a fair trial by an impartial jury. Smith v. State, 986 So. 2d 290. 299 (¶31) (Miss. 2008); U.S. Const. amend. XIV; U.S. Const. amend. VI.

P41. In the case at bar, there was a litany of prejudicial comments by the State in its closing argument. Defense counsel failed to object to the comments discussed below, which would [*31] ordinarily bar this Court from reviewing them on appeal. However, because the State's comments resulted in a manifest miscarriage of justice and a violation of White's constitutional rights of due process and fair trial by an impartial jury, this Court examines the comments under plain-error review. The State's misconduct during its closing argument created an unjust prejudice against White and resulted in a decision influenced by the prejudice so created, thus constituting reversible error. We now briefly discuss the most constitutionally pervasive comments made by the district attorney and the assistant district attorney in their respective closing arguments.

i. Improper Comments on Facts Not in Evidence

P42. Both members of the State's prosecution team focused heavily on the absence of any "motive evidence" submitted by the defense. As stated previously, the circuit court excluded <u>social-media</u> evidence and any other references to such, no matter how vague or how far attenuated the references may have been. The State continuously implored the jury to

"use their common sense" and argued that it made "absolutely no sense" for MM to fabricate the allegations. The assertion was supported [*32] by the district attorney when she said:

Not one time did you hear anything about [MM] hated Curtis [White] I asked them on the stand. I'm trying to see[,] well[,] why would she lie on you [sic]. Not one time did y'all hear anything about, she hated Curtis [White], she had a problem with Curtis [White], no motive whatsoever against Curtis [White].

P43. The State's exploitation of the circuit court's pretrial ruling continued in the assistant district attorney's rebuttal, when she argued that it made no sense for MM to "lie on her Uncle Curtis [White] for no good reason whatsoever," and then noted, "I'm sorry people. That's not how it happens."

P44. HN14 1 It is improper for a prosecuting attorney to comment on evidence excluded by the court. See Matthews v. State, 148 Miss. 696, 114 So. 816, 818 (1927). Here, because the circuit court went to such lengths to exclude evidence even remotely connected to the social-media evidence, the defense was deprived of the ability to present evidence supporting the defense's theory regarding MM's motive to fabricate the allegations. Both the district attorney and the assistant district attorney used the circuit court's exclusion of the evidence to argue that the defense did not provide evidence of MM's motive [*33] for fabrication because none existed. The exploitation of the court's pretrial ruling in this manner was misleading to the jury, prejudicial to the defendant, and improper under the findings of this Court.

P45. Further. HN15[1] "[a]rguing statements of fact which are not in evidence or necessarily inferable from facts in evidence is error when those statements are prejudicial." Jackson v. State, 174 So. 3d 232, 237 (¶12) (Miss. 2015). The district attorney argued throughout her closing argument that White targeted MM specifically. However, she went a step further in also arguing that there was "[n]o doubt in [her] mind that there were other children that day[,] [who] could have helped [White]" set up for the Fourth of July party. No evidence was presented regarding the availability of other children to help White; in fact, the first time that theory was mentioned to the jury was during the district attorney's closing argument. Such statements are prejudicial because they bait juries into believing there is a basis for the argument outside of the evidence presented. This is especially so when the statement is

made by a party who, in the minds of the jurors, has seen all of the possible evidence in the case and, if believed, would not make such a comment unless [*34] it was supported by some type of evidence. The district attorney's comment was made in error, and while not sufficient to constitute plain error on its own, combined with the plethora of other errors, the cumulative effect creates reversible error.

ii. Improper Comments About White's Character

P46. The district attorney made numerous improper comments regarding White's character. HN16[**] Prosecuting attorneys should "refrain from doing or saying anything that would tend to cause the jury to disfavor the defendant due to matters other than evidence relative to the crime." Banks v. State, 725 So. 2d 711, 718 (¶28) (Miss. 1997) (citing Sumrall v. State, 257 So. 2d 853, 854 (Miss. 1972)). It is impermissible to use appeals to the fears of juries, such as a defendant's future danger to society, at the guilt or sentencing phases of trials. Id.; see also Williams v. State, 544 So. 2d 782, 799 (Miss. 1987). Statements that imply a defendant will "commit crimes in the future if acquitted" are improper. Flora v. State, 925 So. 2d 797, 812 (¶46) (Miss. 2006) (citing Banks, 725 So. 2d at 718 (¶26)).

P47. At one point during her closing argument, the prosecutor said, "That's the thing with when people don't get stopped from doing something. Nine times out of ten that happens again. It's the urges." It is clear that the district attorney's purpose in implying that White had a ninety-percent chance of being a recidivist was to play on the fears [*35] of the jury so that they would return a verdict of guilty. While future-dangerousness comments are not per se reversible error, they are improper and prejudicial and, combined with the multitude of other impermissible instances of prosecutorial misconduct in this case, provide another validation for our finding of abuse of discretion and reversible error.

P48. The district attorney made glaring arguments pertaining to White's character and propensity for sexual deviance. Bolstering her unsupported assertion that White had a ninety-percent chance of committing another sexual crime against a minor, the district attorney argued that "[y]ou can live your whole life and nobody is going be [sic] saying you raping [sic] them, unless you are doing it most of the time." In commenting on White's unfaithfulness to his wife and the STDs he gave her, she asked the jury, "Is this the character of someone that you believe?"

P49. Recalling the previous discussion of this evidence, the district attorney was confused when asked to answer the objection alleging that evidence of White's affair was inadmissible character evidence. The district attorney "misspoke" and declared that the evidence was character evidence, [*36] before correcting herself to say the evidence was being offered as evidence of White's credibility. However, the arguments made during her closing argument unequivocally show that her misstatement was in fact the exact reason the evidence was being offered. It was offered to attack White's character, not his credibility. Such evidence was inadmissible character evidence at the time it was admitted, and the district attorney's comments regarding the evidence during closing argument were improper and highly prejudicial. Again, while this instance of prosecutorial misconduct, if isolated, may not be enough to constitute plain error, when combined with the many other instances of misconduct, the cumulative effect warrants reversal.

iii. Improper Comments on the Credibility of Witnesses and the Veracity of Their Testimony

P50. The district attorney and the assistant district attorney repeatedly remarked on the credibility of witnesses and the veracity of thier statements at trial. It is a long-standing and well-known rule that HN17[*] "[a] prosecutor is forbidden from interjecting his personal beliefs regarding the veracity of witnesses during closing argument." Moffett v. State, 137 So. 3d 247, 271 (\$\frac{1170}{170}\) (Miss. 2014) (citing Foster v. State, 639 So. 2d 1263, 1288 (Miss. 1994)). On several occasions during [*37] closing argument, the State remarked that MM "told the truth" at trial and that White did not tell the truth at trial. The State went a step further, and contrasted what defense counsel argued, by saying that the State "was speaking what [was] actually true."

P51. In cases where such remarks were made in response to defense's counsel's arguments or misconduct, the comments were not considered reversible error. See Foster, 639 So. 2d at 1288. However, because the district attorney argued this in her first closing, her remarks clearly could not have been in response to defense counsel's arguments, since she argued before him. The State's remarks were improper and in direct conflict with the precedent of this State. While alone they may not be sufficient to constitute plain error, when combined with all other instances of prosecutorial misconduct in this case, the cumulative effect of the errors requires reversal.

iv. Improper Comments Vilifying White

P52. In perhaps the most egregious and prejudicial instance of prosecutorial misconduct, the assistant district attorney called White a "pedophile" three times during her rebuttal closing argument. The first of which occurred during the first three sentences of her [*38] argument. The assistant district attorney told the jury that "[t]his is a case about Curtis White [,] who is a pedophile." She continued referencing White as a pedophile when she discussed his relationship with MM and LM and his position to prey on them. She remarked that "a pedophile [is] a person [who] gets into the perfect situation" to prey on their victims. Lastly, the assistant district attorney said, "It's been over two years and this man was having sex with this little girl, his niece, the one that he loves so much, multiple times a week. Who does that? A pedophile does it. Tell you who else did it? Curtis White." (Emphasis added).

P53. In addition to the assistant district attorney's distressing comments, the district attorney called White a "child molester" during her closing argument as well. The district attorney attacked defense counsel for his cross-examination of the investigator in this case, and she claimed that defense counsel "tried to make it where [the investigator] had done something wrong." She then said, "But that's what you do when you don't want to reflect on the real issue. You want to make it about somebody else [other] than that child molester you got sitting [*39] over there beside you." (Emphasis added).

P54. HN18 The a criminal case, the district attorney should be careful not to indulge in personal abuse or vilification of the defendant and should not appeal to passion and prejudice." Stewart v. State. 263 So. 2d 754, 758-59 (Miss. 1972), "[I]t is improper for him to indulge in intemperate characterization, personal abuse, or vilification of [the] accused, tending solely to arouse or to inflame the passion and prejudice of the jury against him, even where such comments are to some extent supported by the evidence." Craft v. State, 226 Miss, 426, 434, 84 So. 2d 531, 534-35 (1956). "Further, the jury's decision must be based on the evidence; thus any verdict based on 'bias, passion, or prejudice' will be overturned." Franklin v. State, 136 So. 3d 1021, 1031 (§33) (Miss. 2014) (quoting Sheppard v. State, 777 So. 2d 659, 662 (¶10) (Miss. 2000)).

P55. It is clear that the district attorney's and assistant district attorney's repeated vilification of White during their closing arguments served no other purpose than to

inflame the passion and prejudice of the jury against White. By calling White a pedophile multiple times, the assistant district attorney essentially usurped the jury's role in determining guilt and imposed her own personal beliefs on the jury. Her comments were shocking, highly prejudicial, and are not tolerated by this Court. Both the district attorney and the assistant [*40] district attorney committed prosecutorial misconduct, and we find that the "natural and probable effect" of repeatedly calling White a child molester and pedophile "create[d] unjust prejudice against the accused so as to result in a [jury] decision influenced by the prejudice so created." There is little other purpose for calling a defendant, who is accused of sexual acts with minors, a pedophile than to inflame the jury, prejudice the defendant, and taint the constitutionally guaranteed right of a fair trial. As such, we find this to be plain error that warrants reversal standing alone.

P56. Even if these comments alone were not found to be sufficient to constitute error so plain to warrant reversal, the cumulative effect of these comments combined with the copious amount of other instances of misconduct creates reversible error.

P57. Further, there was not sufficient evidence of guilt presented at trial that would excuse this Court from examining this appeal under reviews for plain error and cumulative error. See <u>Jackson</u>, <u>174 So. 3d at 236-37 (1911-13)</u> (holding that there was sufficient evidence of the defendant's guilt so as to excuse the court from finding plain or cumulative error in regard to prosecutorial misconduct).

P58. Lastly, [*41] the circuit court attempted to remedy the admission of the improper character evidence and prejudicial comments by instructing the jury that testimony regarding acts White committed on a child who is not the subject of this case was not indicative of his character or propensity to act in conformity with that character. While this limiting instruction was gravely needed, we find that the overwhelming prejudicial effect the multitude of errors had on White's constitutional rights could not be cured by the instruction.

P59. Lastly, we attempt to address the concerns raised by the dissent. It appears the dissent views each instance of misconduct in isolation, and as such, would find that White received a fair trial. In doing so, however, the dissent relies on judicial mechanisms—such as jury instructions and limiting instructions—to remedy any inappropriate misconduct by the State. While we agree that in certain instances these instructions are not only

appropriate but useful, we find that the cumulative effect of the misconduct in this case—taken as a whole—deprived White of his fundamental right to a fair trial. We likewise note that the dissent takes issues with White's failure to object [*42] to each inflammatory comment. To reiterate, however, we find that those relevant instances were so inflammatory that the trial judge should have objected on her own motion. See O'Connor. 120 So. 3d at 399 (¶23). Thus, we find that White's fundamental rights were violated, which therefore requires reversal.

CONCLUSION

P60. For the many reasons discussed above, we find that the circuit court abused its discretion and committed reversible error in this case; thus, we reverse and remand for a new trial consistent with the findings of this opinion.

P61. THE JUDGMENT OF THE YAZOO COUNTY CIRCUIT COURT IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO YAZOO COUNTY.

GREENLEE, J., CONCURS. LEE, C.J., BARNES AND FAIR, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J., AND CARLTON, J.; WILSON, J., JOINS IN PART. WESTBROOKS, J., NOT PARTICIPATING.

Dissent by: GRIFFIS

Dissent

GRIFFIS, P.J., DISSENTING:

P62. Because I do not find the circuit court abused its discretion regarding the admissibility of the evidence, nor do I find White was denied due process or a fair trial as [*43] a result of prosecutorial misconduct, I respectfully dissent.

Social-Media Posts

P63. The majority concludes it was reversible error to deny White the opportunity to <u>authenticate</u> the <u>social-media</u> posts. The majority makes this conclusion while admittedly declining "to delve into the merits of the

various evidentiary arguments." However, it is the "various evidentiary arguments" that support the circuit court's ruling.

P64. "Mississippi Rule of Evidence 901 governs the requirements of <u>authentication</u> of evidence." Smith v. State, 136 So. 3d 424, 432 (¶18) (Miss. 2014). "[T]he <u>authentication</u> requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. (citing M.R.E. 901(a)). "A party must make a prima facie showing of authenticity." Id. "Because of special concerns regarding fabrication, the fact that an electronic communication on its face purports to originate from a certain person's <u>social</u> networking account is generally insufficient standing alone to <u>authenticate</u> that person as the author of the communications." Id. at (¶20).

P65. White provided the circuit court copies of the social-media posts. He failed to offer sufficient evidence that the social-media posts were made by MM or that the account was actually hers. [*44] When the circuit court voiced its concern over the authenticity, defense counsel stated, "She's got her name and photograph there." However, "[t]he ease with which defendants and alleged victims alike could fabricate a social media account to corroborate a story necessitates more than a simple name and photograph to sufficiently link the communication to the purported author under Rule 901." Id. at (\$[21]). As White failed to provide sufficient evidence to support a finding that the social-media posts were what he claimed, the circuit court did not abuse its discretion by excluding them.

P66. Additionally, the evidence White sought to introduce centered around MM's sexual orientation and sexual behavior. Pursuant to <u>Mississippi Rule of Evidence 412(a)</u>, "reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual offense is not admissible." Evidence of MM's sexual orientation and sexual behavior, and the family turmoil that occurred as a result of such behavior, is exactly the reputation or opinion evidence that <u>Rule 412(a)</u> excludes. As MM's prior sexual behavior was irrelevant, the <u>social-media</u> posts were properly excluded.

P67. The majority finds the <u>social-media</u> posts are significant to White's defense. I disagree. [*45] White's defense is that MM lied about the allegations charged in the indictment. White sought the introduction of the <u>social-media</u> posts as evidence of MM's motive to lie. However, during cross-examination, MM admitted that she has had trouble in the past being truthful, that she

sometimes tells lies, and that her lies have been a problem with her family. Thus, the circuit court's exclusion of the <u>social-media</u> posts as evidence of MM's motive to lie did not prevent White from presenting his theory of the defense that she does in fact lie.

Prior Bad Acts

Statutory Rape of AB

P68. Typically, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."
M.R.E. 404(b). However, evidence of sexual misconduct involving other minors is admissible under Rule 404(b) when it demonstrates "that the defendant's means of accomplishing [sexual activities] on past occasions bear substantial resemblance to each other and with the present offense, which serves as proof of motive and a common plan or scheme." Boggs v. State. 188 So. 3d 515, (¶13) (Miss. 2016) (citing Gore v. State, 37 So. 3d 1178, 1186 (¶18) (Miss. 2010)).

P69. Here, the record shows both AB and MM lived in close proximity to White, both of their families had a close relationship with [*46] White and trusted him, both had the opportunity to be alone with White, and both had issues with their parents at the time of the offense. The substantial similarities between MM's allegations and White's misconduct with AB support the admissibility of evidence of White's sexual misconduct with AB.

Humphreys County Incident

P70. The State offered evidence that White's sexual misconduct with MM began when he statutorily raped her on July 4, 2012, at Wolf Lake in Humphreys County. Evidence of another crime or prior bad act may also be admissible "to tell the complete story so as not to confuse the jury." Archer v. State, 118 So. 3d 612, 625 (§53) (Miss. Ct. App. 2012). "The prosecution has a "legitimate interest in telling a rational and coherent story of what happened." Id. at (§54) (citing Brown v. State, 483 So. 2d 328, 330 (Miss. 1986)). As the majority notes, "[i]t is the necessity by the State to use the other evidence . . . in order to tell a coherent story that is the key to its admissibility." Flowers v. State, 773 So. 2d 309, 324 (§47) (Miss. 2000).

P71. Here, in order to tell a complete, rational, and coherent story, it was necessary for the State to present evidence of when and how White began his sexual

misconduct with MM. Although the Humphreys County incident occurred at a different time and location, the incident is integrally related in fact [*47] with this case as it involves the same victim and similar allegations of sexual misconduct.⁷

P72. Overall, the record shows evidence of the statutory rape of AB and the Humphreys County incident was properly admitted under <u>Rule 404(b)</u> and filtered through <u>Rule 403</u>, and was accompanied by a limiting instruction. The majority asserts that the circuit court failed to specify under which permitted use the evidence would be admitted. However, the record makes clear such evidence was offered to show opportunity, motive, plan, absence of mistake or accident, and/or intent. Thus, I find the evidence was properly admitted and would affirm.⁸

Prosecutorial Misconduct

P73. I do not find the allegations of prosecutorial misconduct endangered the fairness of White's trial and the impartial administration of justice. <u>Pitchford v. State.</u> 45 So. 3d 216, 233 (¶58) (Miss. 2010). Moreover, I disagree with the majority's opinion that "the circuit court abused its discretion and committed reversible error in this case." Nevertheless, I will address the specific concerns raised by the majority.

Comments on Cross-examination of LM

P74. The majority finds the comment made by the district attorney that "[w]e are here because [White] was raping [MM]" to be inflammatory and prejudicial. However, [*48] the jury had been advised and was aware of the nature of the case. The jury clearly knew the allegations involved and that the State's position was that White raped MM. The fact that this was repeated in front of the jury does not rise to the level of prosecutorial misconduct.

Comments on Cross-examination of White

P75. The majority further finds the prosecutor's interjection of her personal beliefs and projection of guilt White improper. However, onto were contemporaneous objection was made by White. "If no contemporaneous objection is made, the error, if any, is waived. Walker v. State, 913 So. 2d 198, 238 (¶148) (Miss. 2005). The majority claims the comments were so inflammatory and prejudicial that the circuit court should have objected on its own motion. See Gray v. State, 487 So. 2d 1304, 1312 (Miss. 1986). However, if the instances of misconduct were so "plentiful," as the majority notes, White should have objected. White cannot sit idly by and expect the circuit court to object each and every time to what he now claims amounts to "[a]ggregate instances of prosecutorial misconduct."

P76. The majority further takes issue with the prosecutor's questions to White regarding his first wife. However, upon White's objection, the jury was instructed to disregard the questions.

Closing Arguments

P77. [*49] The majority finds a "litany of prejudicial comments by the State in its closing argument." However, once again, White failed to object to any comments made during closing arguments. Regardless, the record shows the jury was properly instructed that statements made by counsel are not evidence.

P78. Upon review, for the reasons discussed herein, I find no abuse of discretion and would affirm White's conviction and sentence.

IRVING, P.J., AND CARLTON, J., JOIN THIS OPINION; WILSON, J., JOINS THIS OPINION IN PART.

End of Document

⁷ Here, MM alleged White parked his vehicle behind a pond, performed oral sex on her, and engaged in vaginal sex with her. Regarding the Humphreys County incident, MM alleged that, while at Wolf Lake, White made her perform oral sex on him, and engaged in vaginal sex with her.

⁸ The majority finds the circuit court abused its discretion in failing to exclude testimony from Brenda Dew. However, White does not raise such alleged failure as an assignment of error on appeal. Instead, White's assignment of error is limited to the statutory rape of AB and the Humphreys County incident.

Smith v. State

Supreme Court of Mississippi April 17, 2014, Decided NO. 2012-CT-00218-SCT

Reporter

136 So. 3d 424 *; 2014 Miss. LEXIS 209 **; 2014 WL 1511303

SCOTT D. SMITH a/ka SCOTT DREUX SMITH a/k/a SCOTT SMITH v. STATE OF MISSISSIPPI

Prior History: [**1] COURT FROM WHICH APPEALED: WAYNE COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 01/20/2012. TRIAL JUDGE: HON. ROBERT WALTER BAILEY. TRIAL COURT ATTORNEYS: ANDY DAVIS, JAMES D. ANGERO.

Smith v. State, 2013 Miss. App. LEXIS 318 (Miss. Ct. App., June 4, 2013)

Disposition: THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND VACATED IN PART. THE JUDGMENT OF THE WAYNE COUNTY CIRCUIT COURT IS AFFIRMED.

Core Terms

messages, Facebook, injuries, authentication, purported, bruise, Photograph, profile, blood, iron, inflict, interview, adult, email, properly authenticated, trial court, sender, phone, hit, witness testimony, three-year-old, postings, alcohol, website, facie, networking, harmless, internet, arrived, custody

Case Summary

Overview

ISSUE: Whether Facebook messages admitted into evidence at defendant's trial were sufficiently authenticated under <u>Miss. R. Evid. 901</u>. HOLDINGS: [1]-The trial court abused its discretion by admitting into evidence the Facebook messages purporting to be from defendant's account, because the State of Mississippi failed make a prima facie case that the Facebook profile from whence the messages came belonged to

defendant, as the only information tying the Facebook account to defendant was that the messages purported to be from a person with defendant's name and were accompanied by a very small, grainy, low-quality photograph purportedly of defendant; [2]-The admission of the two Facebook messages into evidence was harmless beyond a reasonable doubt because the evidence of defendant's guilt was overwhelming.

Outcome

Judgment affirmed in part and vacated in part. Conviction and sentence affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Governments > Courts > Authority to Adjudicate

Criminal Law &

Procedure > ... > Reviewability > Preservation for Review > General Overview

Governments > Courts > Creation & Organization

<u>HN1</u>[Reviewability of Lower Court Decisions, Preservation for Review

The Supreme Court of Mississippi has the authority to limit the issues on review.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Evidence > ... > Preliminary

Questions > Admissibility of Evidence > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

<u>HN2</u>[♣] Harmless & Invited Error, Evidence

An appellate court will review the admission of evidence for abuse of discretion. Moreover, an appellate court will not reverse a conviction unless the trial court has abused its discretion in a manner that was prejudicial to the accused.

Evidence > Authentication > General Overview

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

HN3[♣] Evidence, Authentication

Miss. R. Evid. 901 governs the requirements of authentication of evidence, stating that the authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Miss. R. Evid. 901(a). Authentication is a condition precedent to admissibility. Rule 901(a). A party must make a prima facie showing of authenticity, and then the evidence goes to the jury, which ultimately will determine the evidence's authenticity.

Evidence > Authentication > General Overview

<u>HN4</u>[♣] Evidence, Authentication

See Miss. R. Evid. 901(b).

Evidence > Authentication > General Overview

HN5[] Evidence, Authentication

Because of the special concerns regarding fabrication, the fact that an electronic communication on its face

purports to originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communications.

Evidence > Authentication > General Overview

HN6 [Evidence, Authentication

The ease with which defendants and alleged victims alike could fabricate a social media account to corroborate a story necessitates more than a simple name and photograph to sufficiently link a communication to the purported author under <u>Miss. R.</u> Evid. 901.

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Evidence > ... > Preliminary

Questions > Admissibility of Evidence > General

Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

<u>HN7</u>[♣] Harmless & Invited Errors, Harmless Error Rule

Errors in the admission of evidence are subject to a harmless-error analysis.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

<u>HN8</u>[♣] Harmless & Invited Error, Evidence

Harmless-error analysis prevents setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of a trial. An appellate court will not reverse a conviction for an erroneous evidentiary ruling unless the error adversely

affects a substantial right of a party, or in other words, unless the ruling prejudiced the accused. Thus, where it is clear beyond a reasonable doubt that the error did not contribute to a verdict, an appellate court need not reverse the conviction.

Counsel: FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER, BY: JUSTIN TAYLOR COOK, GEORGE T. HOLMES.

FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: LISA L. BLOUNT, JOHN R. HENRY, JR.

Judges: KING, JUSTICE. WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., LAMAR, KITCHENS, CHANDLER AND COLEMAN, JJ., CONCUR. PIERCE, J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION.

Opinion by: KING

Opinion

[*426] ON WRIT OF CERTIORARI

NATURE OF THE CASE: CRIMINAL - FELONY

EN BANC.

KING, JUSTICE, FOR THE COURT:

P1. Scott Smith was convicted of capital murder for the death of seventeen-month-old Ally Waldrop and sentenced to life without the possibility of parole. Smith appealed his conviction to the Court of Appeals, arguing that the trial court erred in admitting several Facebook messages and that the testimony of an investigator violated the Confrontation Clause. The Court of Appeals found no reversible error and affirmed. Smith filed [**2] a Petition for Certiorari arguing that the Court of Appeals erred in holding that the Facebook messages were sufficiently authenticated, that the Court of Appeals erred by finding that an email from Facebook was not inadmissible hearsay, and that the Court of Appeals erroneously applied a harmless-error analysis to the violation of Smith's confrontation rights. We granted certiorari. On certiorari, we limit our review to Smith's claim that the Facebook messages were not sufficiently authenticated. We find that Smith's claim has merit; however, because the error was harmless, we affirm Smith's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

P2. Some of the following facts and history were adopted from the Court of [*427] Appeals' opinion. Smith married Jenny Waldrop ¹ on April 16, 2010. Waldrop had two children, two-or three-year-old Ethan ² and seventeen-month-old Ally, from a previous relationship. Waldrop worked at the Subway located in the local Walmart. Because they had only one vehicle, Smith typically drove Waldrop to and from work. Smith would care for Ethan and Ally while Waldrop was at work.

P3. On May 28, 2010, Smith took Waldrop to work at 4:00 p.m. Ethan and Ally were with him in the car, and Ally did not have any head injuries. At about 8:00 that evening, Smith called Waldrop at work and told her that Ethan had hit Ally on the head with an iron. He called Waldrop again around 9:00 p.m. and told her that Ethan had hit Ally again with the iron, and that Ally had consequently fallen backward into the wall. Smith then told Waldrop that he had called the hospital and that the hospital told him to watch Ally, and also that he had called his aunt, a nurse, and that one of his aunt's friends was on the way to the house to check on Ally. At about 9:30, Smith called Waldrop again to inform her that a nurse had examined Ally and that she was fine.

P4. Waldrop got off of work around 10:00 p.m. Her manager testified that she clocked out at 10:08 p.m. Waldrop testified tha, t at about 10:10 p.m., Smith had yet to arrive to pick her up. She called Smith and he informed her that the car had broken down and that he was on his way. Waldrop testified that when Smith

¹ She is also referred to in the record as Jena Waldrop and Jena Smith.

 $^{^2\,\}mbox{The record}$ is unclear [**3] as to whether Ethan was two or three at the time of Ally's death.

³ Waldrop testified that this story was Smith's explanation for Ally's injuries, and Smith also explained that this had occurred in his nearly-two-hour interview with the police. A DVD of the interview was admitted into evidence without objection.

⁴ Jennifer Williams, a registered nurse at Wayne General Hospital, testified that she received a telephone call at approximately [**4] 8:00 p.m. on May 28, 2010, from a woman with a deep voice who informed her that her son had hit her daughter on the head with an iron. The caller wanted to know if the child should be brought to the emergency room. Williams testified that she informed the caller that she could not offer a diagnosis over the phone, but would be happy to examine the child in the emergency room.

arrived, the children were not with him. One of Waldrop's co-workers also testified that she observed Smith pick up Waldrop at about 10:10 p.m. and that the children were not with him.⁵ Waldrop testified that Smith told her that he had already put the children to bed.⁶ As soon as they returned home, Waldrop went to check on the children and found that Ally was not breathing, her eyes were half-closed, and she had a knot on her head. At that point, Waldrop testified that she started screaming for Smith to [**5] call 9-1-1.

P5. An ambulance was dispatched at 10:19 p.m. and arrived at the residence at 10:21 p.m. Matt Lee, an EMT paramedic with Wayne General Hospital, testified that he responded to the 9-1-1 call on May 28, 2010. He testified that he could not find Ally's pulse nor could he see respirations, [*428] so he attempted to intubate her. Lee testified that he was unable to intubate her because the scene became unsafe. He stated that Smith began to use vulgar language and questioned why they were not at the hospital yet. The ambulance left for the hospital and arrived at Wayne General Hospital at 10:26 p.m.

P6. Jennifer Williams, [**6] the Wayne General Hospital emergency room nurse, testified that on May 28, 2010, she received a phone call at approximately 8:00 p.m. asking what to do for a young child who was struck in the head with an iron by a sibling. Williams testified that at approximately 10:00 or 10:30 that night, she received a one-year-old child in the emergency room with the symptoms reminiscent of those described in the 8:00 p.m. phone call. She testified that the patient was bluish, pale, not breathing, and unresponsive when she arrived. She also testified that the patient had various stages of bruising in various places on the body, including several bruises to the head.

P7. Wesley Waites, a criminal investigator with the Waynesboro Police Department, testified that he responded to a call from the hospital regarding Ally's

death. Waites testified that Ally had numerous bruises all over her body and that a portion of the back of her head was soft and spongy. Waites testified that Smith informed him that the injuries were caused by Ethan hitting Ally in the forehead with an iron, and Ally falling four to six inches into the wall, striking the back of her head. Waites asked Smith if he would give a blood [**7] sample, and Smith refused. Waites proceeded to get a search warrant for a blood test for Smith and was able to have his blood drawn at approximately 6:30 a.m. on May 29, 2010. Shan Hales with the Mississippi Crime Laboratory testified that the crime lab performed an alcohol analysis and a drug screen on Smith's blood and the blood contained .06% ethyl alcohol. Hales opined that a person's body generally eliminates alcohol at a rate of approximately .02% per hour, with the elimination rate range spanning from .01% to .03% per hour.⁷

P8. Waites testified that he went to the residence at which Ally was injured and did not find any blood or indentations on any of the walls. He also recovered an iron from on top of a washing machine. Waites testified that he did not see any blood on the iron.

P9. Waites and another investigator interviewed Smith at the police station for nearly two hours. This interview was videotaped, and a DVD recording of the interview was entered into evidence without objection. During [**8] the interview, Smith maintained his story that Ethan had hit Ally with an iron, and that he did not know how her other injuries occurred, nor did he know how the severe nature of the injuries occurred. He maintained that Ally was "fine" during his custody. Importantly, he admitted multiple times that he was the sole custodian of Ally during the evening of May 28, 2010, when the injury occurred, and that no other adults were in Ally's presence that evening, until Waldrop got off work at about 10:00 p.m.

P10. Dr. Adele Lewis, the pathologist who performed Ally's autopsy, testified at length about the injuries Ally suffered. She testified that her external examination revealed that Ally had "multiple injuries to her head, to her face, behind her ears, to her chest, to her upper thigh, and to her vagina," many of which "occurred at or [*429] around the time of her death." Ten

⁵ The co-worker admitted that her boss had helped her word her statement to the police, but that it was true that the children were not with Smith when he picked Waldrop up from work.

⁶ In his interview with the police, Smith stated that he left the house to pick up Waldrop at 9:55 p.m. He stated that the car shut off at a stop light, but that it started back up immediately. He claimed that the children were with him when he picked Waldrop up, and that they then returned to the house. He claimed that Waldrop took the children inside, then began screaming for him to call 9-1-1.

⁷ In his interview with police, Smith stated that the sum total of his alcohol consumption on the evening of May 28, 2010, was about one-half of a glass of wine, which he mixed with Kool-Aid.

⁸ She testified that those injuries had likely occurred within six to twelve hours of Ally's death.

photographs of these injuries were admitted into evidence.9 Dr. Lewis also testified that some of the injuries were in locations that were "very unusual for an accidental injury to a child." Additionally, some of the scrapes and bruises were older. Dr. Lewis testified that the internal examination of Ally revealed "a great [**9] deal of bruising all over the child's scalp, on the underneath of her scalp. She also had multiple fractures of her skull. She also had bleeding on her brain, some bleeding behind her eyes, and injuries to her brain." As to the head injuries, she opined that "[i]t takes a great deal of force to produce that sort of injury. . . . [Children] don't sustain injuries like this in the course of their normal, everyday lives. It takes a person with the strength and coordination of an adult to inflict this type of injury." (Emphasis added.) She then stated her medical opinion that it was impossible for a two-or threeyear-old child to inflict those kinds of injury on another:

Q: Is it possible - is it medically possible, in your opinion, for a two-and-a-half or three-year-old child to inflict those kinds of injuries on another with some sort of instrument or weapon?

A: No.

Q: That is not medically possible?

A: Not in my opinion, no.

P11. Dr. Lewis also revealed that the internal examination confirmed that the bruising to Ally's chest and thigh were recent, and that "the blood extended into the deep, soft tissue of the body." She further found that Ally had no heart [**11] or lung disease "or anything else wrong with her," and that the autopsy revealed no "other reason to explain her death." She also found

⁹ Photograph one showed a large bruise and scrape near the back of Ally's head. Photograph two showed a fresh, recent bruise on the inner part of the upper thigh, a location that [**10] is very unusual for an accidental injury to a child. Photograph three showed a large, recent bruise on Ally's left cheek, another very unusual location for an accidental injury to a child. Photograph four showed a very large bruise over the right side of the head and some bruising on both sides of the upper parts of Ally's chest, all of which occurred at or around the time of death. Photograph five showed a bruise over Ally's left eye that appeared to be at least two days old. Photograph six showed a scrape to her nose that appeared to be older. Photograph seven also showed the bruise on Ally's thigh. Photograph eight showed bruising on Ally's shoulders that occurred at or around the time of death. Photograph nine showed tears around Ally's vagina that occurred at or around the time of death. Photograph ten showed the bruise on the back of her head from another angle, and also a bruise behind her right ear that occurred at or around the time of death.

nothing in her toxicology work to explain Ally's death.

P12. Dr. Lewis concluded to a reasonable degree of medical certainty that the manner of Ally's death was homicide and that the cause of death was blunt-force injuries to the head. She noted that the bruising that did not contribute directly to Ally's death was "significant not so much as the cause of death, which is, obviously, the severe injuries to the child's head, but to the manner of death and to showing that many of these injuries were not accidental in nature and that they appear to be inflicted." She again opined that a two- or three-year-old child could not have caused the injuries responsible for Ally's death:

Q:... It has been or it was alleged or told that the child was standing approximately four to six inches from a wall in the home when a two-and-a-half to three-year-old sibling hit her with an iron, a clothes iron, in the head not once, [*430] but twice. The child fell back and hit the wall from that distance. My question to you is, is that - the injuries that you saw, is that medically [**12] possible for that to have occurred?

. . .

A: That story is not consistent with the injuries I saw with this child.

Q: And why not?

A: Again, these injuries were inflicted by someone with the strength and coordination of an adult. A small toddler child - this was a 17-month-old child - is not going to be able to generate enough force just falling backwards four to six inches into a wall in order to inflict those injuries on her head. And similarly, a three-year-old child is not going to be able to wield an iron with enough force to inflict this sort of injury.

Q: So you're confident that this is a homicide? A: Yes, I am.

P13. Witnesses testified that Ally had been injured while in Smith's sole custody before. Waldrop testified that, a few weeks before Ally's death, Ally was injured while Smith was caring for her, and Smith informed Waldrop that Ally had fallen down the stairs. Waldrop's boss, Sara Gardner, testified that she noticed bruising on Ally's face and legs on May 21, 2010, and every day thereafter that she saw Ally. She testified that she asked Waldrop what had happened to Ally and that Waldrop told her that Scott said Ally fell down the stairs. Gardner also testified that Scott was [**13] present when Waldrop told her this.

P14. Additionally, several people testified that Smith complained about Ally and wanted her gone. Waldrop testified that Smith wanted her to find someone else to care for Ally and that his primary complaint was that she cried a lot. Terri Nettles, a friend of Waldrop's, testified that Smith "said it was they [sic] would probably be better if Ally would just quit screaming and crying." Nettles testified that Ally did indeed scream and cry, because she was teething. Paula Chafin, with whom Smith, Waldrop, Ethan, and Ally lived for two or three weeks during May 2010, testified that Smith kept the children while Waldrop was at work and that "the little girl stayed in the bed most of the time." She testified that she and Waldrop had a discussion about whether Chafin would take Ally, and that Waldrop did not want to get rid of Ally.

P15. To that end, the State introduced two Facebook messages and one email notification containing a Facebook message. 10 Two of the messages purported to be from Smith to Walrdop. The third message was from Waldrop to Smith. Two of the Facebook messages introduced were cut off at the right margin, thus giving an incomplete account [**14] of what the messages contained. Aside from the eliminated right margin, the Facebook messages purported to contain conversations regarding the marriage between Smith and Waldrop, the fights they were having, and the problems with Ally that Smith had, specifically with how much she cried. One of the messages purporting to be authored by Smith noted that "[I] feel my temper building and [I] know [I] will hurt someone, they are playing with fire and have no clue." To authenticate the letters, Waldrop testified that she and Smith would write letters to each other on Facebook. She further testified as follows:

Q: Did he - did he give you indications in your Facebook discussions or letters, . . . that he wanted it to be just the [*431] three of you, you, Ethan, and him, and not Ally?

A: Yes, sir.

Q: Did he indicate to you in those communications that he felt like he was, for a lack of a better term, about to boil over with anger?

A: Yes, sir.

Q: Jenny, I am going to show you copies of three documents, and I want you to look at these and tell me if you can identify what they are.

A: It's my Facebook messages.

Q: It's Page 1 - it's three pages. What is the second

page?

A: It's my Facebook letter to him.

[**15] Q: And?

A: His Facebook letter to me.

Q: So the first short one -

A: - was his.

Q: The second one is yours. And the last one is his?

A: Yes, sir.

At this point in the testimony, Smith objected to the admission of the Facebook messages into evidence as hearsay and as not being properly authenticated. The trial court overruled the objection, and the Facebook messages were admitted.

P16. The jury convicted Smith of capital murder, and the trial court sentenced him to life without parole. Smith filed a motion for judgment notwithstanding the verdict (JNOV) and/or a motion for a new trial, which the trial court denied. Smith then appealed his conviction to the Court of Appeals, arguing that the trial court erred in admitting the Facebook messages because they were not authenticated and were hearsay, 11 and that certain testimony by Waites violated the Confrontation Clause. 12 The Court of Appeals found that the Facebook messages were properly authenticated. 13 It found that Waldrop's testimony properly authenticated the Facebook messages, relying on Kearley v. State. 843 So. 2d 66 (Miss. Ct. App. 2003). Smith filed a petition [**16] for writ of certiorari with this Court, which

 $^{^{\}rm 10}\,\mbox{For clarity, this Court will refer to all three documents as "Facebook messages."$

¹¹The Court of Appeals found that the email notification itself was not hearsay because it was an automated process. Moreover, it found that the content of the two messages sent by Smith were admissions by a party-opponent. It determined that Waldrop's message to Smith "could be" hearsay, but that any error in its admission was harmless because Waldrop testified as to the same matters and because overwhelming evidence supported the conviction. We do not review the Court of Appeals' holding on this issue.

¹²Waites testified that the State Crime Lab did not find any fingerprints on the iron. The analyst who performed the fingerprint analysis did not testify. The Court of Appeals found that 1) this issue was procedurally barred because the defense did not object on confrontation grounds; 2) and that [**17] even if there was plain error allowing review, the error was harmless. We do not review the Court of Appeals' holding on this issue.

¹³We do not review the Court of Appeals decision on the authenticity of the message from Waldrop to Smith, because Waldrop admitted in her testimony that she had authored that message.

we granted. M.R.A.P. 17. On certiorari, we limit our review to the question of whether the two Facebook messages sent from Smith to Waldrop were properly authenticated, a question of first impression with this Court. See <u>Guice v. State</u>, 952 So. 2d 129, 133 (Miss. 2007) (HN1 Supreme Court "unquestionably" has the authority to limit the issues on review).

ANALYSIS

P17. <u>HN2[*]</u> We review the admission of evidence for abuse of discretion. <u>Young v. Guild.</u> 7 <u>So. 3d 251. 262</u> (<u>Miss. 2009</u>). Moreover, this Court will not reverse a conviction unless the trial court abused its [*432] discretion in a manner that was prejudicial to the accused. <u>Sewell v. State.</u> 721 <u>So. 2d 129, 138 (Miss. 1998)</u>.

P18. <u>HN3[*] Mississippi Rule of Evidence 901</u> governs the requirements of authentication of evidence, stating that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." <u>M.R.E. 901(a)</u>. Authentication is a condition precedent to admissibility. *Id.* A party must make a prima facie showing of authenticity, and then the evidence goes to the jury, which ultimately will determine the evidence's authenticity. <u>Young</u>, 7 So. 3d at 262. <u>Rule 901</u> gives examples of how the authentication requirement [**18] may be met:

HN4[*] (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

. . .

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

M. R. E. 901(b)(1) & (4). Electronic evidence may be authenticated by the traditional means, and is adequately covered by the current rules of evidence. See <u>State v. Eleck.</u> 130 Conn. App. 632, 23 A.3d 818, 823 (Conn. App. Ct. 2011). However, "the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium." Id.

P19. The authentication of social media poses unique issues regarding what is required to make a prima facie showing that the matter is what the proponent claims. Creating a Facebook account is easy. Millier, Samantha L., Note, The FaceBook Frontier: Responding to the Changing Face of Privacy on the Internet, 97 Ky. L. J. 541, 544 (2008-09). "[A]nyone at least thirteen years old with a valid e-mail address [**19] could create a profile." Petrashek, Nathan, The Fourth Amendment and the Brave New World of Online Social Networking, 93 Marg. L. Rev. 1495, 1506 (Summer 2010). To create a profile, a person must go to www.facebook.com, enter his or her full name, birth date, and e-mail address, and register a password. Facebook then sends a confirmation link to the registered e-mail, which the person must click on to complete registration. Miller, 97 Ky. L. J. at 544. Not only can anyone create a profile and masquerade as another person, but such a risk is amplified when a person creates a real profile without the realization that third parties can "mine" their personal data. Id. at 542. Friends and strangers alike may have "access to family photos, intimate details about one's likes and dislikes, hobbies, employer and other personal information," and, details. consequently, "the desire to share information with one's friends may also expose users to unknown third parties who may misuse their information." <u>Id. at 542-43</u> (describing a study done by an internet security company using "Freddi Staur," a toy frog with a Facebook account, who "friended" several people on Facebook and was able to access [**20] their personal information). Thus, concern over authentication arises "because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password," and, consequently, "[t]he potential for fabricating or tampering with electronically stored information on a social networking sight" is high, and poses challenges to authenticating printouts from the website. Griffin [*433] v. State, 419 Md. 343, 19 A.3d 415, 421-22 (Md. 2011); see also Eleck, 23 A.3d at 822 ("an electronic communication, such as a Facebook message, . . . could be generated by someone other than the named sender"); Campbell v. State, 382 S.W.3d 545, 550 (Tex. App. 2012) ("Facebook presents an authentication concern that is twofold. First, because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate. Second, because a person may gain access to another person's account by obtaining the user's name and password, the person viewing communications on or from an account profile cannot be certain that the author is in fact the profile owner." (internal citations [**21] omitted)).

P20. HN5[*] Because of the special concerns regarding fabrication, "the fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communications." Campbell, 382 S.W.3d at 550 (citing Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012) ("That an email on its face purports to come from a certain person's email address, that the respondent in an internet chat room dialogue purports to identify himself, or that a text message emanates from a cell phone number assigned to the purported author - none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity.")). Therefore, something more than simply a name and small, blurry photograph purporting to be Smith is needed to identify the Facebook account as his in the first place.

P21. HN6[*] The ease with which defendants and alleged victims alike could fabricate a social media account to corroborate a story necessitates more than a simple name and photograph to sufficiently link the communication to the purported author under Rule 901 [**22]. The court in Tienda surveyed cases and noted what that "something more" may be to adequately present a prima facie case of authentication. Tienda. 358 S.W.3d at 639-41. For example, the purported sender admits authorship, the purported sender is seen composing the communication, business records of an internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have access to the computer or cell phone, the communication contains information that only the purported sender could be expected to know, the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or other circumstances peculiar to the particular case may suffice to establish a prima facie showing of authenticity. Id.; see also Griffin, 19 A.3d at 427-28 (social media may be authenticated by testimony from the purported author, by searching the purported author's computer and examining the computer's internet history and hard drive, or by obtaining information directly [**23] from the social networking website that links the profile and posting to the purported author); Commonwealth v. Williams, 456 Mass. 857, 926 N.E.2d 1162. (Mass.

2010) (social media was not properly authenticated where there was no testimony "regarding how secure such a Web page is, who can access a Myspace Web page, whether codes are needed for such access, etc.").

P22. In Eleck, the defendant sought to impeach a state witness with a Facebook message purporting to be from the witness. [*434] Eleck, 23 A.3d at 820. The message was from a Facebook account bearing a user name matching the name of the witness. Id. The defendant testified that the account profile contained photographs and other entries identifying the witness as the holder of the account, and that after the witness testified, the account had removed the defendant as a "friend." Id. at 821. The messages also contained a vague statement that the "past is the past," which the defendant argued was a reference to the assault he was alleged to have committed. Id. at 820 n.2, 824. The witness testified that the Facebook account was indeed hers, but she denied sending the messages, testifying that someone had "hacked" into her Facebook account two to [**24] three weeks prior, and had changed her password such that she had subsequently been unable to access it. Id. at 820. The court held that, although the suggestion that the witness did not author the messages because the account was "hacked" was "dubious under the particular facts at hand, given that the messages were sent before the alleged hacking of the account took place, [the witness's] testimony highlights the general lack of security of the medium." Id. at 824. Thus, the court found that the defendant did not offer the proper foundational proof to authenticate that the messages came from the witness, and not simply from her Facebook account. Id.

P23. In United States v. Jackson, the defendant attempted to introduce website postings from two white supremacist websites to exonerate herself, in an attempt to prove that these white supremacist groups, and not the defendant, sent the racist hate mail that the defendant was accused of sending. United States v. Jackson, 208 F.3d 633, 636-37 (7th Cir. 2000). The court stated that to authenticate the website postings, the defendant "needed to show that the web postings in which the white supremacist groups took responsibility for the racist [**25] mailings actually were posted by the groups, as opposed to being slipped onto the groups' web sites by [the defendant] herself, who was a skilled computer user." Id. at 638. The court found that the defendant was unable to so authenticate the website postings. Id.

P24. Similarly, in this case, the State failed to provide

evidence sufficient to support a finding that the Facebook messages from Smith were what the State claimed. The State failed make a prima facie case that the Facebook profile whence the messages came belonged to Smith, as the only information tying the Facebook account to Smith is that the messages purport to be from a "Scott Smith" and are accompanied by a very small, grainy, low-quality photograph that we can only assume purports to be Smith. No other identifying information from the Facebook profile, such as date of birth, interests, hometown, or the like, was provided.

P25. The State likewise failed to make a prima facie case that the messages were actually sent by Smith. The only information tying the actual messages to Smith is Waldrop's testimony that they were Smith's messages to her. [**26] This does not suffice as the testimony of a witness with knowledge, because the State utterly failed to provide any information as to the basis of her purported knowledge. She did not testify as to how she knew that the Facebook account was Smith's, nor did she testify as to how she knew that Smith actually authored the Facebook messages. Furthermore, the information contained in the Facebook messages was known not only to Smith, but to Waldrop and apparently [*435] to several of her friends and family members. Additionally, the messages provided do not appear to be part of the same conversation; thus it does not appear that Smith's messages are replying to anything in Waldrop's message. Also, no testimony regarding the security of or access to Smith's Facebook account was elicited. Indeed, cases in which romantic partners have accessed social networking accounts illustrates the susceptibility of social media accounts to security breaches. See Campbell, 382 S.W.3d at 552 (defendant and his girlfriend, the victim, were the only ones who had access to his Facebook account. however, his girlfriend testified that she could not access the account at the time the messages were sent and she did [**27] not send the messages to herself); Simmons v. Commonwealth, 2013 Ky. Unpub. LEXIS 7, 2013 WL 674721, at *1 (Ky. Feb. 21, 2013) (law enforcement officers obtained sexually suggestive messages between an adult and a middle-school student because the adult's girlfriend accessed his Facebook account when he ended their relationship).

P26. The trial court therefore abused its discretion by

¹⁴ No testimony or other evidence exists that this photograph is indeed of Smith.

admitting the Facebook messages purporting to be from Smith's account, because these messages were not properly authenticated. Sufficient evidence tying both the Facebook profile and the Facebook message to Smith does not exist. However, our inquiry does not end there. <u>HN7</u>[*] Errors in the admission of evidence are subject to a harmless-error analysis. <u>Young v. State. 99</u> <u>So. 3d 159, 165 (Miss. 2012)</u>.

P27. <u>HN8[*]</u> Harmless-error analysis prevents "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." <u>Chapman v. California.</u> 386 U.S. 18, 22, 87 S. Ct. 824. 17 L. Ed. 2d 705 (1967). We do not reverse a conviction for an erroneous evidentiary ruling unless "the error adversely affects a substantial right of a party," or in other words, unless the ruling prejudiced the [**28] accused. <u>Young. 99 So. 3d at 165</u> (internal quotations omitted). Thus, where it is "clear beyond a reasonable doubt that the error did not contribute to the verdict," we need not reverse the conviction. *Id.* (internal quotations and alterations omitted).

P28. The evidence of Smith's guilt is overwhelming. Most importantly, Smith admitted being in sole custody of Ally during the time in which she suffered the fatal injuries, and he admitted that no other adults were even in Ally's presence during that time, Moreover, Dr. Lewis testified as to her medical opinion that Ally's injuries were not accidental and could not have been inflicted by a child, but must have been inflicted by an adult. Additionally, Waldrop testified as to the sequence of events on the evening of Ally's death. Waldrop's coworker, Nurse Williams, EMT Lee, and Officer Waites also testified as to the events of the night of Ally's death, and their versions were substantially the same as Waldrop's version. Waites testified that he did not observe any blood on the iron retrieved from Smith's and Waldrop's house, nor did he observe any blood or indentations on the wall. Williams, Lee, and Waites also testified regarding the [**29] extent of Ally's injuries, and the jury viewed photographic evidence of her injuries. Additionally, Waldrop, Gardner, Nettles, and Chafin testified regarding Smith's problems with Ally, and regarding Ally having been injured before while in Smith's sole custody. The jury also viewed Smith's nearly-two-hour interview with the police, in which he repeatedly admitted to being the only adult in Ally's presence on the night of May 28, 2010. Furthermore, the jury was presented with evidence that Smith's blood alcohol level was .06% approximately eight hours [*436] after Ally was transported to the hospital, and heard testimony that alcohol metabolizes out of the